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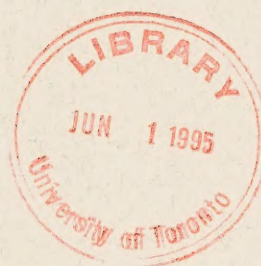
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Summaries of
Decisions
Volume 26, Part I
(1994)

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Summaries of Decisions

Volume 26 Parts I and II

THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL
SUMMARIES OF DECISIONS* - VOLUME 26, PARTS I and II

CITED 1994 26 C.R.A.T. - Part I
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- * This volume contains in some instances full decisions and reasons given, and in others, summaries only of Tribunal decisions and Supreme Court of Ontario decisions. If reference to the exact decision is desired, a request should be made to the Registrar.

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WOLFGANG DROEGE

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF THE BAILIFFS ACT

TO REVOKE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chair, Presiding
JUDITH KILLORAN, Chair as Member

APPEARANCES:
H.J. DOAN, representing the Applicant

GEORGE GLASS, representing the
Registrar under the Bailiffs Act

DATES OF
HEARING: 8, 9, 10, 23 November 1993 Toronto

REASONS FOR DECISION AND ORDER

In a Notice of Proposal dated the 6th day of May 1993, the Registrar seeks to revoke the registration of Wolfgang Droege as bailiff for the County of York.

The facts as advanced by the Registrar are not seriously in dispute and are as follows.

1. Droege applied for appointment as a bailiff by way of application dated February 28, 1991.
2. The name on the application was Wolfgang Droege, with a birth date of September 25, 1949. He indicated that he had previously resided in Vancouver, British Columbia.

3. He indicated his previous employment to be with Redi-Set Business Forms in Don Mills from 1970 - 1980, with Capital Business Forms in Victoria, British Columbia, from 1980 - 1984 and with Accurate Bailiff Service, from 1988 to the date of the application.
4. In response to question eight regarding his qualifications and previous experience as a bailiff, he indicated, "tracing, locator, security and working under Alan Overfield (bailiff) (approximately two years)".
5. In response to question number thirteen, "Have you ever been convicted of any criminal offence? If yes, give particulars. Note: You are not required to disclose any convictions for which a pardon has been granted under the Criminal Records Act and which pardon has not been revoked", Droege responded "Yes, 1975 mischief to private property (fines and jail sentence)".
6. Droege, in accordance with the normal practice, was granted a standard interview for all applicants for appointment as bailiff. Droege was questioned on this conviction and advised that it was at a political rally during his misspent youth. When asked if there had been any further convictions since 1975 he stated, no.

7. Based on the fact that the application was in February 1991 and that the 1975 mischief to private property for which he received fourteen days intermittently and two years probation and that his record appears to be clear since 1985 and all other checks were in compliance with the requirements for bailiff appointment, including Sheriff's executions, the Sheriff recommended to the Ministry that Droege be appointed as a bailiff.
8. Accordingly the appointment to Droege as a bailiff was granted effective December 16, 1991.

Evidence brought to the Registrar's notice subsequently, however, indicated Droege had been convicted in the United States on July 1, 1981 of the offence of participating in an expedition against a friendly nation, i.e. the Island of Dominica and received a sentence of three years in prison in the State of Louisiana.

He was subsequently convicted in the State of Alabama on February 19, 1985 of trafficking in cocaine and given 10 years in prison and a term of three years special parole. Further charges in the same Court dealt with illegal entry into the United States and carrying a concealed weapon on an aircraft in flight. For these offences, he received two years and one year consecutive sentences.

It was when these offences came to the attention of the Registrar that an investigation began resulting in the Proposal to Revoke his registration under Section 9 of the Bailiffs Act. From that decision, Mr. Droege now appeals to this Tribunal.

Jean Ritchie giving evidence on behalf of the Registrar said that she met with the appellant on November 5, 1991 in her capacity as Assistant-Registrar. She pointed out that they discussed question 13 on the application with regard to the conviction for mischief and he stated it was during a misspent youth and he had no other convictions. Accordingly she recommended this appointment which became effective January 31, 1992.

Subsequently, two newspaper articles appeared on February 28 and March 1 in the Toronto papers which were brought to her attention. As a result of the articles, she met with Droege to discuss them and the Louisiana conviction to which they referred. This was the only conviction Droege admitted in his conversation with her at that time. He did, however, say he might still be on parole in the United States, but had been released from parole on the 1975 conviction in Canada.

On cross-examination, Ms. Ritchie admitted the conversation had been in the form of questions and answers and that notes were taken. She pointed out that the substance of the article had nothing to do with the Proposal. It was only the issue of non-disclosure, the frequency of the convictions and the fact that they were recent. Although she acknowledged that she had been Deputy Registrar for nine months during which Droege was registered as a bailiff and she had received no complaints about his work, nevertheless, she recommended the Proposal be issued.

Through the testimony of Donald Forbes, a former investigator with the Department of Consumer Affairs, the Registrar introduced the Certificates of Conviction involving the offences in the States of Louisiana and Alabama (Exhibits 20 and 22). It appears that the appellant was sentenced to a total of 16 years.

A former police officer and retired Sheriff of York County was called by the Registrar since he dealt with the application of Mr. Droege. Alister McLean Wheway was Senior Deputy Sheriff when the appellant appeared before him to complete the application form. The Sheriff's statement is dated March 4, 1991 (Exhibit 12). We note that on the application Droege's employment is stated to be with Capital Business Forms, Victoria, B.C. from 1980 to 1984, but he had been sentenced on July 1, 1981 in Louisiana to three years imprisonment.

Recalling his conversation with Droege at the time, Wheway said the conviction involving mischief may have been discussed, but none of the American convictions had been disclosed. If they had, he said he would not have recommended the appointment.

Joseph Hunter, a Toronto barrister called to give evidence said that he had acted on behalf of Droege on a matter several years before, but did not consider him a client now. He had sworn Droege's affidavit on his application and prepared an affidavit for the firm for which Droege worked, but still insisted that there was no solicitor and client relationship established between him and the appellant.

Cross-examined by Mr. Doan, Mr. Hunter pointed out that he did not bill for the affidavit and in this instance, did not consider Droege a client. On the issue of question 13 on the application dealing with the convictions, Hunter pointed out that he had no occasion to go over the whole document with the deponent as long as he swore the contents to be true. To the question, "Is it possible you could have told him United States offences were irrelevant?", he replied "I think I would have recalled any questions re: convictions. I am certain I said nothing about criminal offences. Had he asked me about U.S. convictions, I would have told him they must be disclosed."

Marie Dignum, former Registrar of the Bailiffs Act and the Consumer Protection Act had issued the Proposal to Revoke the Applicant's registration from a draft Proposal prepared by the former Registrar Ms. Gugins. She said that since Droege had received his appointment not long before the newspaper stories appeared, it was obvious the convictions had not been disclosed and a Proposal should be issued, "Had this information been there initially, I don't believe we would have granted this appointment."

Under cross-examination, Ms. Dignum agreed that she had not found any complaints up to that point concerning the competence of the Applicant as a bailiff. Regarding department policy of appointments with convictions, she said there were criteria and each application was reviewed on an individual basis. Her concerns she observed were the possible misuse of funds and fraud, but her prime concern was the non-disclosure of the criminal record. She also pointed to the acts of violence implicit in the offences and the possession of the deadly weapon. It appears, she continued, that Mr. Droege is on parole until the year 2000.

The Registrar under the Bailiffs Act Stephen Moody noted in his evidence the qualifications referred to in section 6(c) of the Bailiffs Act. He said this section is demanding in that integrity is paramount. He had made his decision for the issue of the Proposal on two grounds.

The first ground was that he must recommend the appointment to the Minister. Could he do so after seeing the convictions? He thought not. The Department was, therefore, misled by the lack of disclosure which put both the Registrar and the Minister in an untenable position.

The second ground was the seriousness of the offences. A total of sixteen years arising out of four convictions reflects the gravity of the offences. He asks, "Can this man live within

the rules?" It appears, of course, that he would have been willing to resort to violence. His parole will not expire until November 27 in the year 2,000 and we do not register people on parole." Moody questioned whether, if disclosure had been made, the appellant would have obtained the bond required under the Act. He further pointed to the information on the application which alleged he was working when he was actually in jail. This he said was false as was the statement that he had been advised by Mr. Hunter the solicitor that he was not required to disclose foreign convictions. Moody added that, although there were no complaints on file, this was not a factor that would change the opinion of the Registrar.

On cross-examination, Mr. Doan asked the witness, "If we were to remove the failure to disclose would you still question his honesty and integrity?" Moody replied "Yes - based on the criminal acts which have come to light." He added that the offences per se all involved dishonesty and violence - the illegal entry into the United States, possession and trafficking in cocaine, possession of a weapon, and the expedition against the Island of Dominica. He concluded saying an honest person simply would not commit these offences.

Wolfgang Droege is presently employed by Accurate Bailiff Services Inc. in the capacity of a bailiff. He said in his evidence that in appearing before the Sheriff to have his application completed, the Sheriff had filled in the answers referring to his employment and that he told him that the dates were only approximate. He further stated that he was unsure of what he should answer on the application and when he saw the solicitor Hunter, he asked him what exactly he should say when he had a record in the United States. Mr. Hunter, he said, told him it was irrelevant. Droege also pointed out the offences to which he had pleaded guilty, although criminal in the United States did not exist in Canada, i.e. expedition against a friendly nation and the deadly weapon he was alleged to be carrying was simply a letter opener he purchased through Soldier of Fortune magazine in the shape of a dagger. He also contended he was not on parole anywhere since he was not obligated to report to a parole officer.

In reference to the attempt to take over the Island of Dominica, Droege said, "I am a true democrat, let the people have a voice, let the community determine its own government." He did acknowledge, however, that in the attempt to take over the island, there was the possibility of loss of life.

On March 12, 1992, Droege was interviewed by Jean Ritchie concerning his application in which he had not disclosed the

convictions in the United States. This interview which was recorded in a question and answer form is particularly illuminating with regard to the integrity of the Applicant. From Exhibit 8, tab 17, the following is reproduced in part:

MARCH 12, 1992

MEETING WITH WOLFGANG DROEGE, BAILIFF

PRESENT: JEAN RITCHIE, LESLIE RUSLAND, WOLFGANG DROEGE

PRIOR TO ASKING DROEGE A SERIES OF PREPARED QUESTIONS, JEAN READ A PREPARED STATEMENT WHICH STATED: "QUESTION 13 OF THE APPLICATION FOR A BAILIFF ASKS 'HAVE YOU EVER BEEN CONVICTED OF ANY CRIMINAL OFFENCE? IF YES, GIVE PARTICULARS.'. YOU ANSWERED YES TO A 1975 CONVICTION FOR MISCHIEF TO PRIVATE PROPERTY. I DISCUSSED THIS WITH YOU DURING OUR MEETING IN NOVEMBER." JEAN THEN VERBALLY STATED "YOU TOLD ME THAT IT WAS 'AT A POLITICAL RALLY IN YOUR MISSPENT YOUTH'". JEAN INFORMED DROEGE THAT OUR DECISION TO RECOMMEND THIS APPOINTMENT WAS BASED ON THE FACT THAT THIS CONVICTION WAS IN 1975 AND HE APPEARED TO HAVE A CLEAN RECORD SINCE THEN. JEAN CONTINUED TO READ, "A NEWSPAPER ARTICLE MENTIONED THAT YOU WERE CONVICTED IN 1981 IN THE UNITED STATES AND SENTENCED TO THREE YEARS FOR YOUR ROLE IN A PLOT TO SEIZE POWER IN THE CARIBBEAN ISLAND OF DOMINICA.".

A SERIES OF PREPARED QUESTIONS FOLLOWED AND THE FOLLOWING NOTES WERE MADE:

1. IS THIS TRUE?

- DROEGE ANSWERED "YES".

- WHEN QUESTIONED REGARDING HIS 1981 OFFENCE, DROEGE STATED IT WAS TRUE AND THAT HE HAD CONSULTED HIS ATTORNEY AS TO WHETHER OR NOT HE SHOULD DISCLOSE THE OFFENCE. DROEGE STATED THAT HIS ATTORNEY DIRECTED HIM TO DISCLOSE ONLY THE 1975 OFFENCE. DROEGE STATED THAT THE ATTORNEY (REED HUNTER) SAID THE QUESTION APPLIED ONLY TO OFFENSES THAT TOOK PLACE IN CANADA AND THAT OFFENSES THAT HAD TAKEN PLACE OUTSIDE OF CANADA WERE OF NO CONCERN TO THE GOVERNMENT AND THAT FOREIGN LAW DID NOT APPLY IN CANADA.

2/3. ARE THERE ANY OTHER CONVICTIONS OR CHARGES OUTSTANDING TODAY, OR IN YOUR PAST IN ANY COUNTRY OTHER THAN CANADA? IF SO, WHAT ARE THEY AND WHERE?

- DROEGE STATED THAT HE HAD NO OUTSTANDING CHARGES AND / OR CONVICTIONS IN CANADA OR IN THE UNITED STATES.

4. WHAT SENTENCES DID YOU RECEIVE?

- DROEGE REFERRED ONLY TO HIS 1975 SENTENCE SINCE HIS ATTORNEY HAD ADVISED HIM THAT OTHER CONVICTIONS OUTSIDE OF CANADA WERE IRRELEVANT.

5. ARE YOU ON PAROLE NOW IN CANADA, THE UNITED STATES OR ANY OTHER COUNTRY?

- DROEGE STATED THAT HE IS OR MAY BE STILL ON PAROLE UNDER UNITED STATES LAW. HE STATED THAT HE IS NOT ON PAROLE IN CANADA NOR IN ANY OTHER COUNTRY OUTSIDE OF CANADA AND THE UNITED STATES.

6. HAVE YOU BEEN RELEASED FROM PAROLE IN CANADA OR ANY OTHER COUNTRY? IF SO, WHERE AND WHEN?

- AS A RESULT OF HIS 1975 OFFENCE, DROEGE STATED THAT HE WAS SENTENCED TO TWO YEARS PAROLE FROM WHICH HE HAS BEEN RELEASED.

It is clear from this transcript of a conversation that Droege again failed to disclose the Alabama convictions for which he had received 13 years in 1985 although asked specifically if there were any other convictions anywhere.

The registration and appointment of a bailiff differs from registrations granted to Applicants under various other Acts involving consumer legislation. It is made under the Bailiffs Act which requires that:

6. An application for appointment as a bailiff shall be made to a sheriff who has jurisdiction in the county in which the applicant intends to carry on business as a bailiff and shall state,

- (a) the name and residence of the applicant;
- (b) the place where the applicant intends to carry on business;
- (c) the qualifications of the applicant to act as a bailiff;

(d) any circumstance indicating that a bailiff is needed for the public convenience in the place where the applicant intends to carry on business as a bailiff; and

(e) whether the applicant has previously acted as a bailiff and, if so, where. R.S.O. 1980, c. 37, s. 6; 1984, c. 11, s. 162, *part, revised*.

7. Upon receiving an application, the sheriff shall examine the applicant and shall forward the results of the examination, together with the security required by section 14 and his or her recommendations, to the Registrar. R.S.O. 1980, c. 37, s. 7; 1984, c. 11, s. 162, *part*.

8. The Minister may recommend the appointment of the applicant as a bailiff if,

(a) the applicant has complied with this Act and the regulations;

(b) the applicant is qualified to act as a bailiff; and

(c) a bailiff is needed for the public convenience in the county in which the applicant intends to carry on business as a bailiff. R.S.O. 1980, c. 37, s. 8.

Droege made his application to Sheriff Wheway, who after the interview, recommended him finding nothing unusual or detrimental in his background. He thus appeared to have the qualifications, experience and a relatively unsoiled background. Accordingly, the Sheriff sent his recommendation to the Registrar from whom it was directed to the Minister. Depending upon the recommendation of her advisors, the Minister then signed her name to a document to be placed before the Lieutenant Governor. The Lieutenant Governor then pursuant to Section 3(1) of the Act attached his name to the Order in Council.

Thus the chain was complete, but it was a chain in which every link depended upon the integrity of the link before it. The Sheriff trusted Droege, the Registrar trusted the Sheriff, the Minister trusted the Registrar, the Lieutenant Governor trusted the Minister. They were, however, all misled by the man who comes before us now to plead bad advice from a lawyer as the cause of his present dilemma.

Nemo dat quod non habet - he can not give what he does not have. Droege could not pass on to the Registrar honesty and integrity he did not possess. The process was consequently thwarted and the appointment in our view to say the least imperfect, but as Mr. Glass, counsel for the Registrar contends it should be considered void ab initio.

In weighing the evidence of Mr. Hunter against that of Mr. Droege, we view that of the latter as unsupportable. There was in Mr. Droege's conduct clearly a deliberate intention to mislead the Registrar and this is particularly evident in his interview with Ms. Ritchie when he had the opportunity to make full disclosure but failed. It is only now before this Tribunal that he has acknowledged the offences and convictions in full.

What if disclosure was not a factor? Surely the convictions and sentences of 16 years in jail must be of consequence in any deliberation of whether or not an applicant is qualified for a particular employment. Implicit in the offences is the possibility of violence. The tendency for violence is an invidious companion for a bailiff whose employment must on occasion subject him to certain risk.

In his Proposal, the Registrar advances as grounds for revocation of Droege's registration the allegation that "he is incompetent or without capacity to act responsibly as a bailiff". These are grounds set out in Section 9(b) in the Act as sufficient to revoke an appointment. The Shorter Oxford Dictionary defines incompetent as "inadequate; of inadequate ability or fitness; not having the requisite capacity or qualification; incapable". Is the appellant's past conduct reflected in these terms? If honesty and integrity are expected of an individual permitted to carry out the duties of enforcing the law, then Mr. Droege must be found to be inadequate and without the capacity to fit that requirement. His past behaviour militates against any other finding.

In defining capacity, the Shorter English Dictionary provides the following: "position; condition; character; relation". Again if character is to be considered an element of the appellant's capacity to carry out his duties, he must unquestionably fail the test. In the matter of James Edward Acker 14 CRAT (1985) at p.3, the Tribunal wrestled with the words of the statute as follows:

What is clear is that these words "incompetent" and "without capacity to act responsibly as a bailiff" are all the Registrar and the Tribunal have to go on

with if we wish to get someone out of this industry upon good and sufficient reason (apart from the narrow scope of section (a) of Section 9). It seems also clear that the main reason the Commercial Registration Appeal Tribunal would want to revoke a bailiff's appointment would be that the Tribunal was satisfied that the bailiff was unfit to have it; "unfit", based on past events and present circumstances and largely with a view to the likelihood or probability of future happenings. One can say "incompetent" and "without capacity to act responsibly as a bailiff" means "unfit" and in other words "not a suitable person" to be a bailiff.

We are of that view. Mr. Droege in the opinion of this Tribunal has demonstrated in his past conduct an unfitness to carry out his duties under the Act. If he will not live within the law himself, can we expect him to comply with the Act in its application to others? We think not.

In a decision on an appeal under a related statute, Peter Kodis (1985) 14 CRAT at p.190, the Tribunal said in setting out the general principles concerning past conduct and non-disclosure:

The Tribunal is of the opinion that the past conduct of the Applicant is the factor to be considered. Time and again this Tribunal has pointed out the seriousness of non-disclosure of matters particularly convictions and proceedings pending which are the very basis upon which the Registrar is called upon to exercise most of his discretion. Though it would appear that the Registrar, in the discharge of his responsibilities, checks and double checks by obtaining records, this is a responsibility and obligation which should not necessarily be upon the Registrar. He should be entitled to rely upon the application form which is submitted to him. The Applicant has given explanations in respect of certain omissions yet those omissions are of a kind that the Tribunal can infer that there was some act of deliberation in respect of the omissions

and the selection of convictions which were made known.

The Tribunal is of the opinion that public protection under this consumer legislation is of paramount importance. This basic principle underlines all the consumer legislation which is set forth for the protection of the public. The Tribunal is aware of the fact that in the discharge of their employment as real estate salesmen they may have fairly free entry into homes, often they have the keys, and property is exposed. It has been pointed out to the Tribunal that during the period of employment as a real estate salesman there were no adverse reports respecting the Applicant with regard to his dealings, no elements of fraud exhibited and, indeed, that he was a good real estate salesman. But the opinion of the Registrar and this Tribunal is not to be so restricted.

Recent similar decisions where the Registrar of Motor Vehicle Dealers and Salesmen was upheld include:

HEARD

Westshore Motors	November 1, 1991	to revoke
Amigos Auto Sales Sales Ltd.	April 29 and May 1, 1992	to refuse to grant registration
Robert Diamond	June 10, 1992	to refuse to grant registration
James Kenneth Foster	November 23, 1992	to refuse to grant registration

Recent similar decisions where the Registrar of Real Estate and Business Brokers was upheld include:

HEARD

Mohammad Abdollah Soufian	February 17, 1992	to refuse to grant registration
Bonnie Wilson	April 10, 1992	to revoke
Darcy Thomas Way	July 6, 1991	to refuse to grant registration
Vladimir Baotic	July 8, 1992	to refuse to grant registration
Richard Anthony Fisher	August 20, 1992	to revoke
Kerry Lavigne	July 17, August 16 and September 23, 1992	to refuse to grant registration

In each decision, the failure to disclose prior criminal convictions was said by the Registrar to be sufficiently serious to either deny or to revoke registration. And in each decision a variety of those and other Tribunal decisions is cited and reviewed.

It is the inescapable conclusion of this Tribunal that from the evidence presented, the Registrar has properly executed the duties of his office in seeking to revoke the registration of Wolfgang Droege as a bailiff because of the non-disclosure of prior serious criminal offences and his past conduct in committing the offences involved. We find as a fact the allegations submitted by the Registrar are proven and that under the guidance of the Brenner decision, we cannot say that the Registrar is wrong.

Accordingly by virtue of the authority vested in the Tribunal by Section 10(4) of the Bailiffs Act, R.S.O. 1990 Chapter D.2, the Tribunal hereby directs the Registrar to carry out the Proposal.

BARRY GOLDMAN
and
BENJAMIN'S PARK MEMORIAL CHAPEL

APPEAL FROM A DECISION OF THE
COMPLAINTS COMMITTEE OF THE
BOARD OF FUNERAL SERVICES OF THE
FUNERAL DIRECTORS AND ESTABLISHMENTS ACT

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding
SELWYN CHARLES, Member
PAUL JANISSE, Member

APPEARANCES:

BARRY GOLDMAN, appearing on his own behalf

MICHAEL C. BENJAMIN, appearing on behalf of
Benjamin's Park Memorial Chapel

DONALD POSLUNS, counsel representing the
Registrar

DATE OF
HEARING:

23 August 1994

Toronto

REASONS FOR DECISION AND ORDER

Mr. Barry Goldman appeals a decision by the Complaints Committee, established by the Board of Funeral Services under the Funeral Directors and Establishments Act (the "Act"), for two reasons:

- 1) He disputes a finding of fact by the Complaints Committee that Benjamin's Park Memorial disbursed \$750 to a third party, namely, Blue Star Lodge, and that he now owes this amount to Benjamin's Park Memorial; and
- 2) He disputes the decision by the Complaints Committee that Mr. Michael Benjamin of Benjamin's Park Memorial should only be admonished for not offering a price list to Mr. Goldman prior to the signing of the contract for the funeral services for Mr. Goldman's mother.

Mr. Michael Benjamin appeals the same decision by the Complaints Committee for the following reason:

- 1) He disputes the jurisdiction of the Complaints Committee to recommend that he should reduce his professional charge to Mr. Goldman by \$337.50 and should waive all interest charges because he did not offer a price list to Mr. Goldman.

A 5-page document constitutes the Complaints Committee Decision. It is dated March 1, 1994, and is signed by the Chairman for the Complaints Committee. The 3 members of the Complaints Committee are first named, then the Complainant: Mr. Goldman, and the Respondent: Mr. Michael Benjamin of Benjamin's Park Memorial Chapel. The Complaints Committee Decision then details the investigation process in sections subtitled the "Complaint" and the "Information", followed by the "Opinion" and the "Decision", which is set out below in its entirety:

In accordance with section 14(2)(c) of the Funeral Directors and Establishments Act, Mr. Michael Benjamin is to be admonished for not offering a price list to Mr. Goldman prior to the signing of the contract and for charging the maximum for the funeral coach in the absence of a complete explanation of the charge. Acceptable funeral service includes the active offering of the price list to the client as required by subsection 41.(6) of regulation 470 under the Funeral Directors and Establishments Act and a full explanation of the reason for any variation in the charges.

Mr. Benjamin should reduce his bill by \$337.50, one half of the professional charge for the funeral director in recognition of the fact that he did not offer a price list to Mr. Goldman. An additional \$70.00 should be deducted from the total invoice to reflect the lower of the charges for the funeral coach. Any interest charges accrued to Mr. Goldman's account should be waived. Provided the Decision is complied with, no further action will be recommended by the Committee.

Mr. Goldman testified that Benjamin's Park Memorial has provided funeral services on three occasions for the Goldman family and that it is only his mother's funeral service in April 1993 that has become a source of complaint. He states that this is because he was given no opportunity by Mr. Benjamin to understand the charges for the funeral services. Mr. Goldman testified that he did not recall receiving any information respecting the specific disbursements to Blue Star Lodge, which owns the cemetery plot, which Mrs. Goldman purchased in 1969, and where she was finally buried.

Mr. Benjamin testified respecting the specific disbursements to Blue Star Lodge, as follows:

\$250 - Foundation for the monument
\$150 - Perpetual care fund (government imposed)
\$150 - Maintenance fund (paid to Bathurst Lawn Cemetery)
\$200 - Deposit to be returned to purchaser once monument is erected
\$750 Total

Mr. Benjamin testified that the usual practice for the billing of services provided by third parties such as Blue Star is to request separate cheques from the purchaser. Mr. Benjamin stated that this practice was followed with Mr. Goldman, who overlooked the request for separate cheques for disbursements. Mr. Benjamin stated that this is done to avoid the misperception that Benjamin's Park Memorial is acting as the agent for the third parties. This practice also avoids the inflation of the bills by Benjamin's Park Memorial by third party costs or disbursements, according to Mr. Benjamin.

In the view of this Tribunal, another advantage to the practice described by Mr. Benjamin is that it avoids the possibility of the dispute that has arisen in this hearing. As counsel for the Registrar asserted, it may be that Mr. Benjamin made a deal to pay an amount that Mr. Goldman would not have paid, if he had been allowed the opportunity to deal directly with Blue Star Lodge.

Nevertheless, the Complaints Committee has made a clear finding of fact that Mr. Benjamin paid \$750 to Blue Star Lodge, on behalf of Mr. Goldman, who now owes this amount to Benjamin's Park Memorial. This finding is based upon what appears to this Tribunal to be a reasonable investigation as detailed in the Decision. Mr. Goldman has presented no evidence to challenge that finding of fact by the Complaints Committee. Mr. Goldman's own evidence is that the funeral service arrangements for his late mother had to be done very quickly because of a pending Jewish holiday. We note in the Decision that the Complaints Committee refers to Mr. Goldman's statement that Benjamin's Park Memorial picked up his mother at 1:00 a.m. on April 4, 1993, and the service was at 3:30 p.m. on April 4th. Given the haste of the arrangements and the stress associated with their making, it is credible to this Tribunal that the \$750 was disbursed to Blue Star by Benjamin's Park Memorial, on behalf of Mr. Goldman, who now properly owes that amount. In the view of this Tribunal, that is the end of the matter.

Turning to the next issue under appeal, Mr. Goldman has asked us whether the Complaints Committee erred in solely admonishing Mr. Benjamin for his failure to give Mr. Goldman a price list prior to the signing of the contract.

Certainly the evidence before this Tribunal supports the

finding by the Complaints Committee that Mr. Benjamin did not offer a price list to Mr. Goldman, as he is required to do under section 41(6) of Regulation 470, under the Act. Mr. Benjamin admitted in testimony that Mr. Goldman did not have a price list in hand when he signed the contract. Mr. Benjamin asserted that he did not intend to breach the law; however, in his experience, he has found that families do not want to be bothered with "details" during this difficult time. Furthermore, Mr. Benjamin asserted to this Tribunal that offering a price list would not have made any difference, excepting the funeral coach charge, which he agreed was properly reduced by the Complaints Committee. This amount of \$70.00, he argued, was Mr. Goldman's only financial loss resulting from the breach of the Act by Benjamin's Park Memorial.

What then is the jurisdiction of the Complaints Committee, upon finding that Mr. Benjamin has breached an obligation to Mr. Goldman under the Act?

The jurisdiction of the Complaints Committee is set out in section 14(2) of the Act as follows:

The Complaints Committee in accordance with the information it receives may,

(a) consider all or part of the matter;

(b) direct that all or part of the matter be referred to the Discipline Committee; and

(c) subject to subsection (9), take or recommend such action that it considers appropriate in the circumstances and that is not inconsistent with this Act, the regulations or the by-laws.

We agree with submissions by counsel for the Registrar that the Complaints Committee does not have the jurisdiction under the Act to impose fines or other penalties. That is the jurisdiction of the Discipline Committee, which is set out in section 16 of the Act.

Mr. Benjamin argued that the Complaints Committee has usurped the jurisdiction of the Discipline Committee by punishing him through its "fine/penalty" of \$337.50, i.e. the loss of half his professional fee, and the loss of interest charges. Although he asserted that no purpose will be served if this matter is referred to the Discipline Committee, he stated that he believes the Complaints Committee is directing him to comply "or else". He argued that Mr. Goldman should not benefit financially from the

inadvertent breach by Benjamin's Park Memorial. Furthermore, he asserted that the interest charges constitute a term of a legally binding contract, which cannot be altered by the Complaints Committee.

Counsel for the Registrar argued that the Complaints Committee has acted within its jurisdiction by making recommendations that Mr. Benjamin "should" reduce his bill and "should" waive interest. Counsel characterized these recommendations as an "educational admonishment" to Mr. Benjamin, upon his second offense of failing to provide a price list to a potential purchaser (See Anisman et al, a decision by this Tribunal, (1992) 23 CRAT 13).

This Tribunal finds that the Complaints Committee has not exceeded its jurisdiction in making the recommendations that it has. In effect, the Complaints Committee has recommended to Mr. Benjamin that he make a good will gesture to Mr. Goldman because he breached his professional duty to Mr. Goldman in failing, apparently for the second time, to comply with the regulatory requirement of offering a price list to potential purchasers, such as Mr. Goldman.

We agree with the Opinion of the Complaints Committee that "if Mr. Goldman had been shown a price list, his concerns about prices would have been alleviated". Perhaps the need for this hearing would have been alleviated and that may be one of the differences that follow the offering a price list to potential purchasers, as required under section 41(6) of Regulation 470 under the Act.

To find that the Complaints Committee has no power to make such recommendations would be to eviscerate the meaning and purpose of section 14(2)(c) of the Act. The Legislature has chosen to set up the Complaints Committee and to empower it to provide outcomes for funeral directors that are less serious than a finding of professional misconduct by the Discipline Committee.

In the view of this Tribunal, the Complaints Committee has properly exercised its jurisdiction and acted reasonably in recommending the reduction of Mr. Benjamin's professional fee and the waiver of all interest charges for the benefit of Mr. Goldman, in recognition of Mr. Benjamin's breach of professional duty to Mr. Goldman.

These are clearly recommendations not penalties or awards of damages. Nevertheless, we agree that there may be consequences for Mr. Benjamin if he fails to comply with this recommendation because the Legislature has chosen to empower the Complaints Committee to refer such matters to the Discipline Committee.

Therefore, by virtue of the authority vested in it under section 14(9) of the Funeral Directors and Establishments Act, this Tribunal upholds the decision of the Complaints Committee and finds no error in fact or law. Specifically, the Tribunal holds that:

1) the Complaints Committee did not err in finding that Benjamin's Park Memorial disbursed \$750 to Blue Star Lodge, on behalf of Mr. Goldman, who continues to owe this amount to Benjamin's Park Memorial; and

2) the Complaints Committee did not err in law in only admonishing Mr. Michael Benjamin of Benjamin's Park Memorial for not offering a price list to Mr. Goldman prior to the signing of the contract for funeral services; and

3) the Complaints Committee has the jurisdiction to recommend that Mr. Benjamin should reduce his professional charge to Mr. Goldman by \$337.50 and should waive all interest charges, in recognition of the fact that he did not offer a price list to Mr. Goldman.

ANDOM, TSEHAYE Z.

APPEAL FROM A PROPOSAL
OF THE REGISTRAR UNDER
THE GAMING CONTROL ACT, 1992

TO DENY REGISTRATION

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding

APPEARANCES:

MR. TSEHAYE ANDOM, appearing on his own behalf

MR. EDWARD WREN, counsel, representing the
Registrar

DATE OF

HEARING: 19 September 1994

Toronto

REASONS FOR DECISION AND ORDER

Mr. Tsehaye Andom appeals a Proposal by the Registrar under the Gaming Control Act, 1992 (the "Act") to refuse him registration as a gaming assistant, specifically as a croupier or dealer, in the charitable gaming industry.

In his Proposal dated February 25, 1994, the Registrar relied upon section 11(a) of the Act, which mandates that the Registrar refuse to register an applicant as a gaming assistant if "there are reasonable grounds to believe that the applicant will not act as a gaming assistant in accordance with law, or with integrity, honesty, or in the public interest, having regard to the past conduct of the applicant".

The facts are not disputed. Mr. Andom made application for registration as a gaming assistant on July 21, 1993. He answered "no" to question 5, which reads as follows:

5. Have you or a corporation of which you were an officer or director ever been found guilty or convicted of an offence under any law or are there any charges pending? This includes where a conditional discharge or an absolute discharge has been ordered.

If yes, attach full particulars (offence, dates, police force, disposition) on a separate and signed statement.

However, on December 2, 1992, Mr. Andom had been convicted of the criminal offence of assault with a weapon, being

a knife. He was sentenced to imprisonment for 4 months, plus time served (about 2.5 months). He was released from prison in February 1993, subject to a 3-year probation order that expires in December 1995.

Mr. Andom's supervising probation officer, Mr. Cymbalista, testified to the terms of the probation order, which included periodic reporting, no contact with Mr. Andom's ex-partner and their son, and undergoing anger management therapy. Mr. Cymbalista stated that Mr. Andom had difficulties complying with the terms of his probation, describing an incident where Mr. Andom was charged with threatening death to his ex-partner; this charge was dropped to failure to comply with a term of his probation and Mr. Andom was sentenced to 15 days in jail. Mr. Cymbalista also referred to Mr. Andom's refusal to undergo anger management therapy. As a result, Mr. Andom was sentenced to 30 days in jail in February 1994, for failure to comply with a term of his probation.

At Mr. Andom's trial in February 1994, Mr. Andom assaulted a female court officer, in the presence of Mr. Cymbalista, who intervened. Consequently, Mr. Andom was convicted of simple assault and sentenced to an additional 60 days in jail.

Mr. Andom testified to the circumstances of these convictions. He opined that none of these convictions were his fault. With respect to the conviction of assault with a weapon, he stated that his girlfriend attacked him and cut herself accidentally. Respecting the charge of uttering death threats, he stated that he was only attempting to protect himself from his girlfriend's harassment of him through her letters. With respect to the assault on the female court officer, he stated that he merely pushed her in his effort to address the court. Concerning his failure to comply with the term of his probation requiring him to attend anger management therapy, he stated that he did not have a problem with anger and that it is just "human nature" to become upset sometimes.

Mr. Andom further testified that the reason that he did not disclose his December 1992 conviction for assault with a weapon was because he misunderstood question 5. He stated that he knew that he had a criminal conviction at the time he made the application for registration. However, he said that he believed that question 5 referred only to business-related or commercial offenses, such as fraud, or offenses committed in a corporate capacity. English is not his first language, he said, and as a result he sometimes gets mixed up. He testified that he would not lie to obtain his registration because he is not ashamed of his criminal record. He has learned his lesson and now acknowledges

that he made a mistake in his response to question 5. He stated that he did not request any assistance in completing the application.

Under cross-examination, Mr. Andom stated that there were no specific words in question 5 that he did not understand. He agreed that question 5 applies to "an offence under any law", which includes any criminal convictions of an individual.

However, Mr. Andom characterized his criminal conviction as "only a domestic matter", in a letter, dated October 18, 1993, which he acknowledged that he had sent in response to the Registrar's Notice of Intent to refuse registration. In this letter, Mr. Andom stated his belief that:..."there is no reason to associate domestic problem with public affairs. I also believe that this type of criminal record cannot prevent me from working." However, Mr. Andom stated that this was not the reason that he failed to disclose his criminal conviction.

Mr. Andom's probation officer testified that Mr. Andom appeared to communicate reasonably well in their dealings. Mr. Andom wrote letters in English to the officer, Mr. Cymbalista, which he stated were not difficult to understand. Mr. Cymbalista added that Mr. Andom had immigrated from Ethiopia in 1985, where he had studied electronics/mechanics, and later took college-level computer studies for 2 years in Canada. Mr. Cymbalista further stated that Mr. Andom was unable to secure employment and was receiving social assistance. Mr. Andom agreed that Mr. Cymbalista was correct in his testimony.

An investigator with the Gaming Commission testified that she had interviewed Mr. Andom in September 1993 to provide him an opportunity to explain his non-disclosure. She stated that Mr. Andom told her that he misunderstood question 5 and thought the question only applied to corporations. She testified as well that Mr. Andom apparently had no communication problems during the interview.

Further, the investigator, Ms. Fiona Douglas-Crampton testified that in her experience Mr. Andom's work as a croupier, dealing with the public in the charitable gaming industry, would be subject to less security surveillance than similar work in Windsor. She described possible methods that would allow a croupier, who handles large sums of money in the form of chips, to defraud the public or the charitable gaming industry.

Finally, the investigator reiterated the Registrar's concerns, which were contained in his Proposal, respecting Mr.

Andom's application: those concerns centred upon Mr. Andom's failure to disclose his criminal conviction and its serious nature.

Counsel for the Registrar argued that the seriousness of Mr. Andom's recent criminal conviction for assault with a weapon was reflected in the heavy penalty imposed by the court. He further argued that Mr. Andom's non-disclosure must be viewed as intentional. In support of this, counsel pointed out Mr. Andom's apparent comprehension of English, his motivation to acquire registration, and his view of his criminal conviction as "only a domestic matter" that should not impact on his work dealings with the public.

Moreover, counsel argued that Mr. Andom's non-disclosure was consistent with his past conduct in response to regulatory authority, that is, Mr. Andom formed his own view of what was required to satisfy the Registrar, as he had done in response to the court and the probationary terms that it had imposed. Mr. Andom's non-governability, according to counsel, was also evident in his continuing convictions, including an assault on a female court officer. He argued that Mr. Andom's convictions for failure to comply with the terms of his probation should be viewed in the context that probation constitutes much stronger regulation than is available under the Act.

This Tribunal agrees with counsel for the Registrar that Mr. Andom's explanation for failing to disclose his conviction for a serious criminal offense, upon application for registration, lacks credulity. Taking into account the ample evidence, including Mr. Andom's demeanour at this hearing, the Tribunal is of the view that Mr. Andom's past conduct, for which he appears unwilling to assume any responsibility and which continues to result in convictions, demonstrates a clear pattern of non-governability or disrespect for regulatory authority. The gaming industry is regulated in the public interest and, in order to work in that industry, this Applicant must be seen as capable of complying with the law and of acting in the public interest. The Tribunal finds that the Registrar had reasonable grounds to believe, in particular, that Mr. Andom will not act in accordance with the law and in the public interest. Therefore, when reasonable grounds exist for such a belief, the Registrar "shall refuse to register an applicant as a gaming assistant", pursuant to section 11(a) of the Act.

Therefore by virtue of the authority vested in it under section 13(8) of the Gaming Control Act, 1992, the Tribunal directs the Registrar to carry out his Proposal to deny the Applicant registration as a gaming assistant under the Act.

PENNY COLLEEN DUPUIS

APPEAL FROM A PROPOSED ORDER OF THE
REGISTRAR OF THE GAMING CONTROL ACT, 1992

TO REFUSE REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chair, presiding

APPEARANCES:

PENNY COLLEEN DUPUIS, Applicant
EDWARD WREN, representing the Registrar of
Gaming Control Act, 1992

DATE OF

HEARING: 30 November 1994

Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Commercial Registration Appeal Tribunal arising out of a Notice of a Proposed Order to Refuse Registration issued by the Registrar of Gaming Control on June 16, 1994. On May 25, 1993, the Applicant completed an application on the prescribed form for Registration as a Gaming Assistant in the category of croupier. She swore the necessary Affidavit in support thereof on June 2, 1993 and delivered it to the Ministry on the same date:

Question 5 on the form reads as follows:

Have you or a corporation of which you were an officer or director ever been found guilty or convicted of an offence under any law or are there any charges pending? This includes where a conditional discharge or an absolute discharge has been ordered. If yes, attach full particulars (offence, dates, police force, disposition) on a separate signed and dated statement.

To this question, she answered "No".

The office of the Registrar caused a search to be made and found she had a criminal record as follows:

<u>Date</u>	<u>Location</u>	<u>Charge</u>	<u>Disposition</u>
Oct. 6/86 Toronto	Toronto	Fraud Under \$1,000 (3 charges)	Conditional discharge and 2 years probation

As a result of obtaining this information, the Registrar requested Fiona Douglas-Crampton, an investigator with the office to look into the matter. She did this, including an interview with the Applicant and submitted her findings to the Registrar. As a result of the information he obtained, the Registrar issued the Proposal. His reason given was that the Applicant is not entitled to registration under section 11 of the Act as "there are reasonable grounds to believe that the Applicant will not act as a gaming assistant in accordance with law, or with integrity, honesty, or in the public interest, having regard to the past conduct of the Applicant." In giving particulars of the same, the Registrar set out the details of the conviction, stated that the Applicant admitted these charges applied to her and went on to say:

5. The Registrar has satisfied himself that the Applicant intentionally failed to disclose the above information and therefore gave a false answer in the application for registration.
6. Under the Gaming Control Act, 1992 and Regulations an applicant for registration must complete an application for registration fully and honestly.
7. As a regulated industry in Ontario, the commercial delivery of gaming services requires the utmost honesty and integrity to be demonstrated by its registrants. The first step in establishing the most basic honesty and integrity required is the truthful completion of the application for registration.
8. In light of the Applicant's past conduct, her failure to fully disclose her offences, as well as knowingly furnishing false information in the application for registration under the Act, the Registrar proposes to order that the Applicant's application for registration be refused.

On August 18, 1993, the Applicant went to the office of the Registrar, but was not able to see Ms. Douglas Crampton. She

saw someone else who suggested she write out an explanation of the conviction and why she did not report it in her application and she wrote out two letters on that occasion and gave them to the Ministry. They read as follows:

During the later part of 1986, on three separate occasions I went to Toronto Dominion Bank's ATM and deposited empty envelopes, in the machine, then withdrew a total amount of \$600.00.

Several days later the Bank Manager called me and said that he wanted to see me. I went to the Bank and spoke to him, at this time he told me that I would have to pay back the amount immediately or else he would have me charged with fraud. I explained to him that I could not pay the full amount back all at once, but would make payments every two weeks on payday. He told me that was not acceptable and he would have me charged with fraud, then I left the Bank.

Several days after later, the Police came to my home and took me to the station and officially charged me with fraud, then released me.

After several postponements, I went to trial, and pleaded guilty to fraud. At this time, I was given two years probation with an absolute discharge, due to the fact that I had made full restitution to the Bank on my own accord. I did my full probation with no incidents.

The reason I answered NO, on my application for Black Jack Dealer, to the question about being charged for a criminal offence, was that after receiving an absolute discharge, and making restitution, to the bank, I put the incident behind me and have not been involved with any unlawful activities since. I have since held many responsible positions with high recommendations. I also had forgotten all about the incident, which is the reason I didn't put it on the application.

I sincerely apologize for overlooking the offence that happened in 1986, I assure you this was not intentional and at no time was I try to falsify my application.

Again, please accept my sincere apologies.

I quote these in full because what she wrote must be considered carefully together with the other evidence we had at this hearing in determining what becomes the critical question here.

The only witness for the Registrar was Fiona Douglas-Crampton aforementioned. She began by giving some background information about how the charitable gaming industry has expanded in Ontario in recent years having reached an annual growth of 2-billion dollars. It was because of this volume and the extent of complaints as to cheating that it became necessary to regulate the industry with the Gaming Control Act and Regulations made thereunder which are now in place. She explained how the persons who operate the charities are not experts on operating the gaming activities and retain the services of gaming suppliers to do this and these, in turn, have employees who are the licensed gaming assistants to run the actual games. The charities and their people rely heavily upon the gaming suppliers and these in turn must rely upon the gaming assistants to be absolutely honest and operate the games with complete integrity.

She said that there are always a number of complaints as to cheating under investigation by the Ministry and that, in the game of black jack, cheating requires the collusion of the dealer. One scheme is to pay off others who are in it improperly and split the ill-gotten gains later and another is to secret about the dealer's person and pass them to third parties later who cash them and split the proceeds. She also explained that, with the charitable gaming, there is not the surveillance and the video taping of the play which provides a very effective check on cheating and a means of dealing with allegations of the same which is the case at the permanent casino in Windsor. The reliance which must be placed upon the honesty and integrity of the operators of the game is, therefore, the greater.

Coming to the facts relevant to this particular case, Ms. Douglas-Crampton said she had an interview with the Applicant on September 30, 1993. She said she had the two letters which the Applicant had written on August 18 and the Applicant reiterated the explanation set out in those letters. On that occasion, Ms. Douglas-Crampton said the Applicant told her that she had forgotten completely about the whole incident. As to the offences

themselves, she said that she put three envelopes on the same day into an automatic teller machine of the Toronto-Dominion Bank by way of deposits to her account without there being any funds deposited with them and then she drew against these, \$200 each, for a total of \$600. The Applicant told her she was in trouble with her husband at the time and it was his suggestion that she do this.

During the interview, the Applicant indicated she did not know very much about the Act, but she was knowledgeable about the rules of play, including the two styles of blackjack and appeared competent in this regard. Ms. Douglas-Crampton said that after she was advised of the refusal, the Applicant called on the telephone on March 28, 1994 and said she wanted to re-apply. Ms. Douglas-Crampton advised her that she could do this and get her money back on the first application, but that it would be faster for her to appeal the decision which she had already obtained to the Tribunal which then she did. Mrs. Dupuis did not cross-examine Ms. Douglas-Crampton stating that she had stated everything accurately.

Mrs. Dupuis then gave evidence on her own behalf. She was born in 1964 and completed grade 10 in school. She has worked as a cook and is a superintendent in an apartment building. She told the Tribunal that at the time she was charged in 1986, it was a sad point in her life. She had bad trouble with her then husband who seriously abused her both physically and mentally. The particular circumstances which led to the charge against her were that she was working and had saved up some money for Christmas and her husband had got it and spent it all. She was very upset and he suggested to her the scheme of making deposits with no funds to the Toronto-Dominion Bank's automatic teller machine and then drawing against these deposits and thus getting the money she wanted to buy things for Christmas which she did. The Bank picked up what happened very shortly and the Manager called her in. At the time, her pay was being automatically deposited to her account there and she said that all she could do was have the Bank take it until the amount was paid off. However, the Manager said she must replace the whole \$600 at once which she could not do so he called the police and she was charged. She had made complete restitution before the charges came on for trial and the disposition was made as shown above.

I come now to what is the critical evidence in this case which I must assess. Mrs. Dupuis told the Tribunal that she had completely turned her life around by 1988. She got rid of her then husband who had been very bad for her in many ways, she has remarried, she has had more than one responsible position with good companies and has really got her life together. She said that this criminal conviction was only one part of a very bad experience with the former husband and when she was able to get rid of all of this trouble, she completely put it all out of her mind and that the

whole episode, not just these charges and the conviction, were completely blocked out of her memory.

She said that when she was answering the question on the application, she honestly believed she had no conviction and she still did so when being questioned about this until certain details, including her address at the time, were drawn to her attention and she realized this was her address and it was herself to whom the record referred.

On cross-examination, she said she had no difficulty with any of the questions on the application and had no intention whatever of lying or misleading anyone. She said that when the Bank Manager called her in and asked her if she forgot to put the funds into the deposit envelopes, she immediately told him the truth with the results above-mentioned. She said that she was ordered to do 150 hours of community service, but after doing 100 hours she was excused from the remainder. She had no problem whatever with this or with her probation.

Mrs. Dupuis said that she was bitter at what had happened - being beatings and mental abuse. This conviction was only a part of what was a total experience of which she was ashamed and about which she wanted no one to know. She said it would still be completely out of her mind if this business had not brought it back. When she was cross-examined as to whether she might not have been belittling the importance of the conviction or have thought it unimportant, she answered "Oh, heavens no" and agreed that the Registrar was quite right to take all of this into account, but added that so also should what she was telling us also be taken into account.

In this case, I must assess this evidence very carefully and assess her credibility in giving it. I have done this as carefully as I can and have concluded that I should accept her evidence and believe that she is telling the truth. Throughout the hearing, she had an open and straightforward manner. She appeared completely sincere in everything she said and in every position she took. While she was understandably bitter toward her former husband, she appears really to have put this bad episode in her life behind her and it is consistent with what she has done that she put it completely out of her mind. Her demeanour and attitude, not only when giving her evidence but throughout the whole of the hearing, was that of an honest and straightforward person.

The Applicant also called on her behalf her mother-in-law, Mrs. Cecil Dupuis as a character witness. The latter said that she had known the Applicant for eight years and that she knows her to be a very honest and a caring and kind-hearted person. She is presently working as a superintendent in an apartment building

with handicapped people, seniors and single mothers. Her mother-in-law said that the Applicant is thought of very highly by everyone in the building and that her honesty would be above reproach.

In coming to a conclusion as to the order which I should make here, I should consider particularly two legal principles which have been laid down in the applicable jurisprudence. The first is that in the leading case of Re Brenner CRAT 19 (1971-1989) SCO Decisions and Orders p.58. This was a decision of the Divisional Court on appeal from the Tribunal. The Tribunal had directed the Registrar of Motor Vehicle Dealers and Salesmen not to carry out a Proposal and to grant a conditional registration to Brenner. The applicable words of the statute are the same as that found in section 11 of the Gaming Control Act except that it did not contain the words "or in the public interest" and the powers of the Tribunal, set out in section 7(4) of the Motor Vehicle Dealers Act were the same as its powers pursuant to which it hears this case. In giving the judgment of the Divisional Court, Southey J. says:

The powers of the Tribunal on the application are set out as follows in s.7(4):

...direct the Registrar to carry out his proposal or refrain from carrying out his proposal and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

The effect of s.7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to

have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

We are unable to see how the Tribunal could possibly have arrived at the conclusion that the past conduct of Brenner did not afford reasonable grounds as required under s.5(1)(b) and, accordingly, we find that the Board erred in its decision to direct the Registrar to grant a conditional registration.

By reason of the facts of that case, the Divisional Court sent the matter back for a rehearing by the Tribunal and said in the third last paragraph:

The proper question at the rehearing remains, however, whether the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

In a number of cases, the Tribunal has made it clear that the statute gives to the Registrar a discretion which he has both the right and the duty to exercise as to whether the past conduct of an Applicant affords reasonable grounds for the belief that the Applicant will not carry out his or her duties, if registered, in accordance with the law or with integrity or honesty or, in the case of the Gaming Control Act, in the public interest. In these cases, the Tribunal has also made it clear that this discretion is that of the Registrar and not of the Tribunal. It is not enough for the Tribunal to decide that it would have exercised the discretion differently. If it is to reverse the Registrar, it must go further and be able to say that the Registrar is wrong in his conclusion.

In this case, counsel for the Registrar, quite properly, puts his case primarily upon the ground of the incorrect answer to question 5 in the application rather than upon the facts of the convictions themselves. If the Applicant is not to be denied her registration because of her answer to question 5, then she should

not be denied it on the circumstances of the conviction itself. It is over eight years old, it was a single conviction for theft under \$1,000, she was in no such trouble before and none since, she made full restitution and completed probation and community service so satisfactorily as to be excused part of the latter. Indeed, it is unlikely this case would be here if she had answered "Yes" to question 5 and set out details with it.

The critical question in this case becomes whether the Tribunal should accept Mrs. Dupuis' explanation of why she answered "No". The Tribunal dealt with this question in its decision of Bonnie Wilson released on June 17, 1992. This was a case in which an Applicant answered "No" to a question about a criminal record when, in fact, she had such record. In the third last paragraph of the judgment, the Tribunal said:

Accordingly unless an Applicant has a real and accepted explanation that he or she honestly believed that the false information was, in fact, true at the time of its submission or unless the false information is of rather minor consequence, the Tribunal cannot overrule the Registrar. To do so would be to open the option to anyone who would prefer to conceal some information. To try doing it that way first, knowing there is always a good chance he would not be caught and even if he were caught, he would still have a chance of explaining it away without having to meet the test as presently laid down.

As indicated above when dealing with the Applicant's evidence, I find her to be a credible witness and I accept her explanation and find that, when she filled out the application, she did not believe she was being dishonest in any way. The whole incident of the theft of the \$600 was only part of what was a very bad experience in her life and she has dealt with this in quite an intelligent and responsible manner. If she had told a story that the incident of the theft and her conviction and sentence were only what had escaped her mind, that would have been difficult to accept. But the evidence that she has got her life together and turned it completely around and, as part of doing this, she has put all of this "nightmare" behind her and out of her mind, is consistent and believable.

It should also be noted that the Tribunal had a good deal more evidence on this point and an opportunity to assess the credibility of the Applicant which the Registrar did not have when

he issued his Proposal. The law is clear that the Tribunal must make its decision upon all of the evidence at the hearing and not just upon what was available to the Registrar when he issued his Proposal.

Accordingly, pursuant to the authority vested in it by section 13(8) of the Gaming Control Act, the Tribunal sets aside the proposed order and directs the Registrar to issue the registration for which the Applicant has applied.

ADAM HAYDEN HART

APPEAL FROM A PROPOSED ORDER OF THE
REGISTRAR OF THE GAMING CONTROL ACT, 1992

TO REFUSE REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chair, presiding

APPEARANCES:

LARRY SILVERBERG, representing the Applicant
EDWARD WREN, representing the Registrar of
Gaming Control Act, 1992

DATE OF

HEARING: 25 November 1994

Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Commercial Registration Appeal Tribunal arising out of a Notice of Proposal to Refuse Registration of the Applicant as a gaming assistant in the category of croupier. The Applicant filed his application on the prescribed form on August 11, 1993. The Applicant was interviewed with regard to the application by telephone by an investigator with the office of the Registrar of Gaming Services on September 28, 1993. On October 1, 1993, the Registrar wrote to the Applicant advising that he intended to refuse the application and the registration and that a Notice of Proposal to this effect would be issued, but that the process would take several months. The Notice of Proposal was, in fact, issued on April 25, 1994. The appeal from the Proposal by way of a request for this hearing was issued by the Applicant's solicitors on May 12, 1994 and received by the Tribunal on May 16, 1994. This hearing came on this day November 25, 1994.

At the opening of the hearing, counsel for the Applicant raised, as a preliminary matter, an objection to the proceeding on behalf of his client, submitting that the delays, in no way the fault or responsibility of his client, were so inordinate that they constituted an abuse of process and that the Registrar should be penalized by having an order made against him, not to carry out his Proposal. It was the submission of counsel for the Registrar that no order could be made as requested. The Tribunal determined that no such order should be made without a hearing on the merits and once that hearing were held, the decision would have to be made on the merits upon all of the evidence adduced.

The hearing then proceeded in the regular way. The first witness for the Registrar was Fiona Douglas-Crampton, an investigator with the Gaming Control Commission. She had received

this application, a copy of which is found at tab 2 of Exhibit 5. She noted that he had answered "Yes" to the question of whether he had any criminal convictions - question 5 on the form - and had given as details that he had been convicted on October 22, 1991 under the Criminal Code of Canada of theft under \$1,000 and sentenced to a suspended sentence with probation for fifteen months and 110 hours of community service. The probation and community service were completed. A search of police records and court records disclosed an information sworn on April 8, 1991 alleging two counts, a charge of theft of a carton of cigarettes, the property of Pharma Plus Drugmarts Ltd. of a value not exceeding \$1,000 and a charge of possession of the same as stolen property. He pleaded guilty to the first count and was convicted and the second count was withdrawn (see tab 3 of Exhibit 5). He was employed with Pharma Plus Drugmarts Ltd. at the time, so this was a theft from an employer with an element of breach of trust contained therein.

Ms. Douglas-Crampton told us that she made the decision to interview the Applicant by telephone rather than personally because he had made full disclosure of his record and there was no issue of non-disclosure in the case. From this whole episode, the only past conduct on the part of the Applicant which may support the Registrar's conclusion is the fact of the conviction itself. There was also an issue about some work which the Applicant had done in the summer of 1993. In response to a question, the Applicant told her that he had worked for a casino operator as a dealer in July about 30 hours for which he was not paid at the time, but that he expected to be paid for these voluntary hours when he gets his registration. Ms. Douglas-Crampton was cross-examined on this and produced a sheet of paper with the notes which she took at the time which is Exhibit 6. It contains the notes "Worked in July. Will be paid for volunteer hours (about 30) when he gets registered."

In the course of the discussion, Mr. Hart told the investigator that when he was charged in 1991, he had gone to a psychiatrist, one Dr. Benchitrit for help with a problem which he had and I shall make further reference to later. Ms. Douglas-Crampton contacted his probation officer and was told that he had completed his probation and community service without any problems and without any cause for criticism. In paragraph 8 of the Proposal, a criticism is made of the Applicant that he held himself out as a "volunteer" with the charity while performing some of the community service when, in fact, he was an employee acting as a gaming assistant on behalf of a gaming supplier. In her evidence, Ms. Douglas-Crampton said Mr. Hart never indicated to her that he was a member of the charity involved.

On cross-examination, she said that it was her

understanding that in all applications where criminal convictions were indicated or discovered, it was the policy that the Applicant must be interviewed and that each case must be considered on its own facts. She said she had recommended a refusal in this case, but that she had seen at least 50 cases where criminal convictions were involved in which she had recommended issue of the registration. She said that, in April, when the Proposal was being issued, the Registrar asked her to do some follow-up. She spoke on the telephone with Mr. Hart's Probation Officer and was told that he had no concerns for Mr. Hart, he had completed his probation and community service satisfactorily.

The next witness was the Registrar, Mr. Major. He began by giving some background information concerning the Gaming Services industry and the Act which it is his responsibility to administer. He told of the great increase in recent years in Ontario in casino and Monte Carlo gambling and the large amounts of money involved. In 1993, the Gaming Services Act was introduced to regulate the industry. He referred to the facts that this is a cash intensive industry, the charities rely very heavily upon the gaming suppliers and these in turn must rely heavily upon their employees, the gaming assistants and the standards for their honesty and integrity must be set very high. This is the responsibility of the Registrar and he has not only the authority, but the duty to ensure that these standards are met. He went on to point out that the wording of section 11(a) of the Gaming Control Act includes the words "or in the public interest" which are not contained in similar sections in other statutes setting the standards required of applicants for other regulated occupations in Ontario and it does this to include the interest of the public at large, not just those who are consumers of the services of this industry, have in this whole gaming industry in Ontario being conducted in a manner which is above reproach.

Mr. Major said that in Ontario last year, there were licensed over 2,000 charitable casino events which must be held in locations all over Ontario, almost always in some local hall. They do not have the sophisticated surveillance equipment which is used at the permanent location of the Windsor Casino and there is a higher risk of schemes of cheating. There is always a number of these under investigation at any time. These schemes must involve the complicity of the dealer at blackjack. The most frequent are the paying out of chips improperly which are later cashed by the recipients and the ill-gotten gains split with the dealer or the hiding of chips about the person of the dealer later given to a third party who cashes them and splits the stolen benefit. If everyone at a table is in on it, no one will report the scheme, all will benefit, and the big loser will be the house being the charity. So the honesty of the dealer is paramount.

Mr. Major said that all applications which indicate evidence of a criminal record are checked with the police records and all such Applicants must be interviewed. He told of receiving this application with the information brought to him by Ms. Douglas-Crampton. He had two concerns with this application. The first was the fact of the conviction itself, the second was the fact that it involved a breach of trust - theft from his employer and also was quite recent, the Applicant being only a short time off probation as part of his sentence. He also had some concern with the evidence that the Applicant had told Ms. Douglas-Crampton that he had worked without pay while not registered, but expected to be paid for this after he obtained his registration, but the Registrar said he did not attach as much weight to this point. However, it did appear that this was a course of action followed to escape the requirement of the Act.

Mr. Major said he considered carefully the explanation put forward by Mr. Hart of the psychological problem leading to the commission of the offence of stealing the cigarettes. I shall deal in more detail hereafter with this. It is sufficient at this point to note that Mr Major stated that it was apparent to him from the plea of guilty and the sentence imposed by the Provincial Court Judge that the latter who tried the criminal case did not attach a great deal of weight to this evidence and that he, Mr. Major did not consider that it was sufficient to override the inescapable conclusion which he must otherwise draw from all of the evidence.

At this point, Mr. Major was shown a copy of a letter from Dr. Benchitrit dated September 19, 1991 (obviously obtained at the time of the criminal charge for the purpose of assisting Mr. Hart with sentence). He said that he had seen it before issuing his Proposal and it had not changed his opinion. He said that he never heard of the disorder mentioned and that the letter did add a consideration which he said he found "a bit troublesome", but he could not conclude that he should change his opinion that this past conduct of Mr. Hart gave him cause to believe that he would not act in accordance with the standard set by section 11(a) of the Act.

On cross-examination, Mr. Major agreed that while he was doing his community service, the Applicant could have been selling break open tickets and handing out prizes at the bingo hall. He said that the degree of supervision of charitable gambling events varies greatly from event to event and supervision and pit bosses can not see everything. If a dealer cheats, he can influence the outcome of a game. He also said that he has granted applications for registrations to applicants who have criminal records and that every case must be determined on its own facts and merits.

Mr. Hart gave evidence on his own behalf at the hearing. He is 21 years old, a third year student at York University hoping

to graduate in 1995 in sociology. He is also presently working part-time as a manager of a Pizza Hut take-out unit where he handles the cash and does the banking. In the summer of 1993, he worked with Casino Consultants Limited and took the course to train as a croupier. After he completed it, he worked for Casino Consultants for \$10 an hour plus tips for two weeks. He then continued as a volunteer. He said that he never expected to be paid later for this period, but he hoped, having done this as a volunteer, that Casino Consultants would give him more work when he would be paid after getting his registration. There is some conflict between this evidence and that given by Ms. Douglas-Crampton. However, she made it clear he never represented to her that he was a volunteer worker for the charities and while the expectation of extra work in the future could well be consideration within the meaning of the prohibition against working without a registration for consideration, this is not a very serious breach of the statute.

In discussing the conviction for theft, Mr. Hart told us that he had been employed at a store Pharma Plus Drug Marts Ltd. and had stolen a quantity of cigarettes, about \$700 worth, not for a profit for himself, but to give to friends. He was caught in possession of them and charged as indicated. He said he told the police officer he was glad that he was caught because he was afraid if he had not been, he would do it again. He said he knew he had a medical problem and went to Dr. Benchitrit whom he saw about 20 times. The Tribunal did not have the benefit of hearing from Dr. Benchitrit and only had the letter he wrote for use in dealing with sentence at the criminal trial. Like Mr. Major, I have never heard of this disorder to which the doctor refers and have the same difficulty in dealing with it with only the letter before us. What this evidence is cannot be understood without a copy of the letter and so I set it out in full:

September 19, 1991

SILVERBERG AND WEISBERG
BARRISTERS AND SOLICITORS
4240 SHEPPARD AVE. EAST
AGINCOURT, ONT.
M1S 1T6

ATTENTION: LARRY SILVERBERG, B.A., LL.B.

TO WHOM IT MAY CONCERN:

Adam Hart is an eighteen old young man, living with his mother and step-father, and his nineteen year old sister, Miriam. Adam attends Grade 13 this year at Bayview

Secondary School.

He came to his first interview on May 6, 1991 because of depressive symptoms consequently to charges for stealing cigarettes from a store where he worked.

Adam had a history of a child suffering from an Attention Deficit Hyperactivity Disorder, that was diagnosed in his childhood, but not properly treated due to difficulties of his parents dealing with the issue of putting a child on medication.

Adam coped more or less well with his probably genetically transmitted Disorder, until his lack of impulse control, as well as lack of adequate concept formation brought him into facing the above mentioned charges. This lack of impulse control and concept formation that are associated with and part of the Attention Deficit Hyperactivity Disorder, are generally corrected when the individual is treated with medication.

Attention Deficit Hyperactivity Disorder is a condition that does not disappear in the Adulthood, contrarily to what was believed until very recently. The physiological dysfunction of the brain, remains in the Adulthood and may produce a dysfunctional adult, socially, professionally, and scholastically.

After discussing the diagnosis and the treatment with Adam and his mother, Adam started taking his Methylphenidate Slow Release, and did very well in his summer school, as well as from the social and interpersonal point of view. He decided, on his own, to stop taking his medication during the summer, but realized, within three days, that he became socially dysfunctional, again, within his family. He restarted his medication again, and he is presently doing very well.

Adam understood, therefore, the importance

of keeping being treated for his Attention Deficit Hyperactivity Disorder Residual type of Adulthood with the Methylphenidate indefinitely. As such, it might be anticipated that Adam will be doing quite well in his social, professional and familial life, should he keep his treatment. His Antisocial behaviour, shown through what he was charged for, by the Society, should be corrected and prevented from recurrence, as long as he keeps his treatment.

I must emphasize that one has to understand that a person suffering from an untreated Attention Deficit Hyperactivity Disorder, and who is dysfunctional, does not, necessarily, understand, and realize at full extent, the consequences of his or her acts, due to the inadequate concept formation deficit, associated with his or her condition. Nevertheless, it remains the responsibility of the affected individual, or his or her parents, to realize the extent of the dysfunction and seek the appropriate help that the person needs.

I hope that this will help to clarify the condition under which Adam has been acting and charged. I also hope that this clarification will help the Court to deal, with Adam, in a fair way, considering his condition.

Respectfully submitted,
 "Dr. M.M. Benchitrit, M.D."
 F.R.C.P.(C) Psy.

Mr. Hart went on to say he pleaded guilty and was given a suspended sentence with probation for fifteen months and 110 hours of community service which he has completed. He was given a choice of two places to do his community service and he chose this work at the bingo hall as aforementioned.

For his mental disorder, the doctor prescribed a drug of which he took one pill a day for two weeks and increased to three pills a day after a month and he is still taking these pills. He said this drug helped him greatly. He said his school work

improved and he has generally improved and his thought processes are much better. He said that at one point, he stopped taking his pills and he felt immediately worse so he has continued and will continue. He said that so long as he is doing this, he has no inclination whatever to steal anything or act in an anti-social manner.

On cross-examination, Mr. Hart admitted that he had a problem and said that is why he went to the doctor. With regard to the offence itself, he said he worked in the drug store as a clerk at the cash desk and as a stock-boy. He said he took 13 or 14 cartons of cigarettes all the same day. He put them in bags and took them away and was arrested on his way back from a break.

This is not an easy case for the Tribunal. In addition to the statutory provisions to which I have already referred, I must be guided by a number of legal principles laid down in the applicable jurisprudence. The first of these is that laid down in the leading case of Re Brenner CRAT 19 (1971-1989) SCO Decisions and Orders p.58. This was a decision of the Divisional Court, on appeal from this Tribunal from an order requiring the Registrar of Motor Vehicle Dealers to register an applicant to whom he had proposed to refuse registration.

The language of the section upon which the Registrar was required to exercise his discretion was the same as in section 11(a) of the Gaming Control Act except that it did not contain the words "or in the public interest" as found therein. In the Brenner case, Southey J. deals with the critical point in the following language:

The effect of s.7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had

genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

Southey J. then, for reasons peculiar to the facts of that case, sent it back for a rehearing by the Tribunal and said in the third last paragraph:

The proper question at the rehearing remains, however, whether the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

In many cases, it has been held that a principle which follows from this judgement is that these statutory provisions give to the various Registrars a discretion in reaching a conclusion as to whether the past conduct of an Applicant affords reasonable grounds for belief that an Applicant will not carry on business as required. In a number of cases, the Tribunal has held that this discretion is that of the Registrar and not of the Tribunal. See the case of John P. Crone, a decision of the Tribunal released on May 27, 1994. At the bottom of page 5 of the judgment, it is stated:

It is important to understand that clauses (a) and (b) of subsection (1) of Section 6 of the Act, unlike clause (d) thereof give to the Registrar a discretion in determining upon which side of the line the Applicant falls. It is also important to understand that the discretion is given to the Registrar and not to the Tribunal. It is not sufficient for the Tribunal to conclude that it would have exercised the discretion differently. In order to reverse the Registrar's decision, the Tribunal must be able to say that the Registrar was in error in his conclusion and that the past conduct with which we are concerned does not afford reasonable grounds for such a belief.

Another principle by which I must be guided is that a

primary function of the Tribunal is to protect the public and the public interest. All of these statutes regulating the conduct of persons in these industries and who may be registered are termed consumer protection legislation put in place for this purpose. See the case of Giovanni Giannini 14 CRAT, p.179 where the Tribunal said:

The primary function of the Tribunal is to protect the public whose members are entitled to the assurance that this regulated industry will be carried on by strictly honest men and women whom they may look to for advice and honest counsel in the course of business with complete confidence.

Also in this context, see the case of Ronald W. Northover 13 CRAT, p.292, where the Tribunal said:

The Tribunal finds itself with no option other than to uphold the Registrar's Proposal. This is not because it looks upon Mr. Northover with a particularly dire feeling of disapproval. It is prepared to concede that he has to some extent, quite possibly to a considerable extent, been the victim of bad luck, unfortunate circumstances or factors beyond his control. But the overriding consideration here is the question of policy and the question of public perception of the policies which will be followed and used as guidelines by the various Registrars who are charged with the responsibility of presiding over the various industries all coming within the jurisdiction of the Ministry of Consumer and Commercial Relations.

Another principle which I must follow is found in the case of Stuart A. Montgomery (1988) 17 CRAT 257 where the Tribunal says at p.258:

It should be noted that it is the past conduct of the Applicant which must be considered, not his present intent, no matter how sincere that intent.

Another principle for which I need cite no authority is that I must decide the case upon all of the evidence at the hearing and not

just upon what was available to the Registrar when he issued his Proposal.

In considering all of the evidence and the principles to which I have referred, I have somewhat reluctantly, come to the conclusion that I must confirm the proposed order of the Registrar. I do this upon the following reasoning. If I ignore completely the evidence concerning the medical problem of the Attention Deficit Hyperactivity Disorder, there is no doubt as to the proper conclusion. We have here a conviction for theft, comparatively recently in 1991, being a theft from an employer with the element of a breach of a fiduciary duty. While it was a first and only offense, the Provincial Court took a relatively serious view for a first offence on a charge of theft under \$1,000 with 15 months probation and 110 hours of community service. Upon such evidence, it would be impossible to say that the Registrar is wrong in his conclusion that this past conduct on the part of Applicant gave him reasonable grounds for believing that he would not meet the standard required by section 11(a) of the Gaming Control Act.

I must, however, consider what difference, if any, the evidence of the medical condition should make to this conclusion. In the first place, the evidence is not of the best. The Tribunal is being asked here upon the strength of a letter from the doctor, written over three years ago for quite another purpose upon what is to me a novel and complex matter, to set aside an obvious conclusion otherwise proper upon the evidence and to do this with no opportunity of testing the medical opinion by cross-examination or even of bringing it up to date.

I appreciate that the onus is upon the Registrar to prove his case here and not upon the Applicant to disprove it. However, as I have indicated subject to what effect should be given to this evidence of the medical problem, the Registrar has proved his case and I am not able, upon the kind of evidence we have here to overrule the logical conclusion to be drawn from an otherwise clear factual situation.

Therefore, pursuant to the authority vested in it by section 13(8) of the Gaming Control Act, 1992, the Tribunal confirms the proposed order of the Registrar of Gaming Control.

HEATHERINGTON, ROGER

APPEAL FROM A PROPOSAL BY THE
REGISTRAR UNDER THE
GAMING CONTROL ACT, 1992

TO REFUSE REGISTRATION

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding

APPEARANCES:

ROGER HEATHERINGTON, on his own behalf

EDWARD WREN, counsel representing the
Registrar of the Gaming Control Act, 1992

DATE OF

HEARING: 26 September 1994

Toronto

REASONS FOR DECISION AND ORDER

Roger Heatherington appeals a Proposal by the Registrar under the Gaming Control Act, 1992 (the "Act") to refuse him registration as a gaming assistant, specifically as a bingo caller.

In his Proposal dated February 9, 1994, the Registrar relied upon section 11(a) of the Act, asserting that "there are reasonable grounds to believe that the applicant will not act as a gaming assistant in accordance with law, or with integrity, honesty, or in the public interest, having regard to the past conduct of the applicant".

The grounds, in the Registrar's view, are the Applicant's failure to disclose his prior criminal convictions and bankruptcy upon application to the Registrar, the nature and extent of the Applicant's past offenses, and allegedly working as a bingo caller without registration.

The facts are that Mr. Heatherington has been working as a bingo caller for approximately 10 years. When the Act came into force, Mr. Heatherington was required to apply for registration as a bingo caller. He did so by application dated February 27, 1993. However, the application was not sworn until August 1993 and it is not disputed that the Registrar first received the application on August 16, 1993.

Mr. Heatherington answered "no" to the following questions on his application:

5. Have you or a corporation of which you were an officer or director ever been found guilty or convicted of an offence under any law or are there any charges pending? This includes where a conditional discharge or an absolute discharge has been ordered. If yes, attach full particulars (offence, dates, police force, disposition) on a separate signed and dated statement.

6. Are you now or have you ever been involved in personal bankruptcy proceedings? If yes, attach - Assignment or Discharge papers.

Mr. Heatherington agreed that his application also contained a Statutory Declaration that "all the answers provided in this application as well as all the information contained in the documents and materials submitted with it are to the best of [his] knowledge and belief true and complete". He also agreed that his application sets out the warning that "it is a serious offence to provide false information on this application and any attachments".

Nevertheless, it is not disputed that the Applicant was convicted of possession of a narcotic under the Narcotic Control Act (2 charges) on August 18, 1986; possession of stolen property under \$1000 and possession of a prohibited weapon, on August 27, 1986; and assault on November 26, 1993, contrary to the Criminal Code.

Mr. Heatherington also made an assignment in bankruptcy on November 29, 1982 and was discharged on September 20, 1984.

Mr. Heatherington offered as explanation for his failure to disclose his prior convictions and his bankruptcy that he believed after 7 years these matters would no longer appear on his record. He understood that he could apply for a pardon of his criminal convictions after 5 years; he agreed that he failed to do so.

He added that his bankruptcy arose out of a farming operation about 10 years ago. In his view, the bankruptcy was irrelevant to his application for registration as a bingo caller.

Mr. Heatherington described the circumstances of the convictions in August 1986 as all arising out of one incident where several people resided with him in a house that he owned. He testified that the narcotics, which the Applicant variously described as amphetamines or "1 marijuana cigarette and 3 drops of

oil", had been left in a dufflebag by someone else. Under cross-examination, he disagreed that his misdescription of the narcotics involved was done to minimize the offense.

The stolen property was a TV control box, which was brought into his home by his then girlfriend, neither of whom, he said, knew that it was stolen. The Applicant pleaded not guilty to these charges. He was fined \$50 for each count under the Narcotic Control Act or 30 days on each charge in default. For the possession of stolen property, he was fined \$300 or 15 days in default.

Respecting the conviction of possession of a prohibited weapon, the Applicant admitted that "this charge was his" and he pointed out that he pleaded guilty to this August 86 offense. He testified that the prohibited weapon in his possession was a sawed-off shotgun with a barrel length of less than 18". He stated that he used this shotgun when he was farming in remote areas in the early 80's, to protect himself from animals, and had sawed off the barrel to allow it to fit under a tractor seat.

Under cross-examination, Mr. Heatherington agreed that question 5 was clear in its reference to "an offence under any law" or "charges that are pending" and does not refer to charges that are "on the record". He stated that he would have provided the Registrar with a copy of his criminal record, as he had done in response to a request in October 1993, when he applied for a liquor license.

He agreed that he did not seek any assistance in completing the application. He further agreed that he made assumptions in response to questions 5 and 6 and that these assumptions were wrong.

Respecting the November 1993 assault conviction, the Applicant argued that this was irrelevant because at the time of completing his application in August 1993, he had not yet been convicted and considered himself innocent until proven guilty. He agreed that he was initially charged with assault causing bodily harm on August 27, 1992, and that this involved numerous court appearances.

He characterized the assault as a "technical" one against his former wife, which occurred when he attempted to remove her from his home, into which she had entered uninvited. He stated that he did not believe himself guilty of any serious misconduct; however, he pleaded guilty to a lesser charge of assault, after the testimony of the victim, in order to obtain her signed release of any liability on his part for civil damages. He provided the Registrar's Office with a copy of the transcript of his trial for

assault, which was entered into evidence; in attempting to point out certain discrepancies in the testimony of his former wife, he agreed that the only facts before the court had been the testimony of his former wife.

Ms. Fiona Douglas-Crampton, an investigator with the Gaming Control Commission, testified that she interviewed Mr. Heatherington by telephone on December 8, 1993, who confirmed the prior convictions and explained that he had misread question 5 of the application. She stated that she also informed Mr. Heatherington that he must cease work immediately for Flamingo Bingo in Chatham, where he indicated that he was continuing to work part-time pending his registration.

Mr. Heatherington testified that he ceased working as a bingo caller immediately after this December 1993 telephone interview with the investigator from the Gaming Control Commission. He testified that until that interview, he assumed that he would be registered because of his lengthy employment in the field. He stated that he further relied upon the fact that he had heard nothing to the contrary from the Registrar's Office, which had cashed his application fee.

Mr. Frederick Erickson, the manager of Flamingo Bingo, testified that the Applicant worked for him for about 2 years until October 31, 1993. Entered into evidence was a letter by Mr. Erickson, dated September 20, 1994, in which he stated that the Applicant worked for Flamingo Bingo from October 1991 to November 1993, and was "very responsible, honest, personable and reliable". Mr. Erickson added that the registration process under the new Act was confusing but that he assumed Flamingo Bingo and its employees could continue in business, once application was made, until notified to the contrary. He testified that he now requires all gaming assistants to be registered prior to commencement of employment.

The Gaming Control Commission investigator testified as to various methods that may be employed by bingo callers in "cheating schemes", in the million-dollar industry of bingo. Most such schemes involved some manipulation of the balls and required either the knowledge or cooperation of the bingo caller. The investigator also stated that bingo callers can change locations/employers, which may use different equipment, without notification to the Registrar.

Mr. Erickson in response testified about the type of equipment and the security measures in place at Flamingo Bingo that prevent cheating by bingo callers, in his opinion. He agreed that other bingo halls may not have similar equipment or security measures.

Counsel for the Registrar argued that the Applicant's failure to be truthful in his application for registration to work in the gaming industry is relevant in any assessment of the Applicant's honesty and integrity and willingness to act in accordance with law. He asserted that this Applicant cannot even comply with the minimal governance of completing an application with candour. Referring to the 1993 assault conviction, counsel argued that the Applicant's wrongful conduct did not apparently cease in response to the much stronger sanctions that are available under the Criminal Code and which were imposed for the 1986 convictions, as opposed to any sanctions under the Act for non-compliance.

Counsel further argued that registration as a gaming assistant is far from automatic under section 11(a) of the Act. Instead, this section mandates that the Registrar refuse such registration where "reasonable grounds" exist as specified. Counsel also pointed out that section 11(a) mandates refusal of registration where reasonable grounds exist that the applicant will not act "in the public interest". This statutory obligation, he asserted, requires that high standards be imposed upon applicants for registration in the gaming industry. He argued that offenses of dishonesty or ones that involve violence, such as are present here, show that the Applicant cannot be seen as capable of acting in the larger public interest.

Mr. Heatherington argued that his work record as a bingo caller demonstrates his honesty and integrity and that it is unfair to take away a person's livelihood because new rules are now in force.

This Tribunal agrees that this Applicant should not be refused registration solely on the basis that he continued to work as a bingo caller pending registration, during what has been described as a confusing period of time when the new rules were coming into force. It was not disputed that this Applicant ceased working as a bingo caller immediately upon receiving a telephone request from the Registrar's Office to do so, and despite having the apparent support of his employer to continue working.

Nevertheless, this Tribunal must agree that the Registrar had reasonable grounds for the belief that this Applicant will not act as a gaming assistant in accordance with law, or with integrity, honesty, or in the public interest, having regard to his past conduct, sufficient for the purposes of section 11(a) of the Act.

In the view of this Tribunal, Mr. Heatherington's application to the Registrar showed numerous instances of non-disclosure that were based upon somewhat self-serving assumptions:

he failed to disclose his prior criminal convictions, his bankruptcy and his pending charge, all of which he attempted to minimize in importance and relevancy. However, this Tribunal finds that the nature of the convictions is a concern, as well as their continuation in time to a point as recent as the year of application.

Therefore, by virtue of the authority vested in it under section 13(8) of the Gaming Control Act, 1992, this Tribunal directs the Registrar to carry out his Proposal to refuse this Applicant registration as gaming assistant.

WILLIAM JOHNSTON

APPEAL FROM A PROPOSED ORDER OF THE
REGISTRAR OF THE GAMING CONTROL ACT, 1992

TO REFUSE REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chair, presiding

APPEARANCES:

WILLIAM JOHNSTON, appearing on his own behalf
DON BOURGEOIS, representing the Registrar of
Gaming Control Act, 1992

DATE OF

HEARING: 23 November 1994

Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Commercial Registration Appeal Tribunal arising out of a Notice of Proposal to Refuse Registration issued by the Registrar of Gaming Control on June 3, 1994 and an Amended Notice of Proposal to Refuse Registration issued on November 17, 1994.

The Applicant who was born in 1971 and lives in Essex Ontario completed a grade 12 education and has been working and driving a truck in a construction business. More recently, he attended a trade school in Windsor and obtained his certificate as a qualified blackjack dealer. He then applied for employment at the Windsor Casino. He filed a formal application on the form prescribed dated March 11, 1994 (see tab 3 of Exhibit 5). Attached to the form is a Certificate from the operator of the casino that, if he obtains this registration, it will employ him as a dealer.

The Applicant's difficulties arise out of his answers to three questions in the form, being questions 11, 12 and 13 which read:

11. Have you ever had a licence or certificate other than those listed above refused, denied, suspended or revoked in any jurisdiction?

If yes, provide the following information on an attached sheet:

- a) Name and address of licensing or other body;
- b) Type of licence/certification;

- c) Action taken (e.g. refused, denied, suspended or revoked);
- d) Date action taken; and
- e) Reasons.

12. Have you ever been found guilty or convicted of an offence in any jurisdiction?

Note: This includes where a conditional or absolute discharge has been granted.

If yes, provide the following information for each conviction or finding of guilt on an attached sheet:

- a) Description of conviction or finding of guilt;
- b) Date of conviction or finding of guilt;
- c) Description of sentence;
- d) Name and address of Court; and
- e) Court file number.

13. Do you have any charges pending in any jurisdiction?

If yes, provide the following information for each charge on an attached sheet:

- a) Description of charge;
- b) Date of charge;
- c) Name and address of Court; and
- d) Court file number.

To questions 11 and 12, he answered "No", and to question 13, he answered "Yes" and added beside the question on the sheet rather than on an attached sheet, the words "possession of narcotic Feb.25/94 Sunday."

A search of the records by the O.P.P. showed that he had two charges pending against him, namely a charge of possession of a narcotic being marijuana on February 25, 1994 and also a charge of possession of a restricted drug namely Lysergic Acid Diethylamide (commonly called acid) on the same date. The search also disclosed the following list of traffic offenses:

<u>Date</u>	<u>Location</u>	<u>Conviction</u>
05-23-91	Windsor	Failure to yield right of way to traffic lawfully using intersection

06-28-91	Windsor	Speeding 76 KMH in 50 KMH zone.
11-15-91	Windsor	Failure/improper use of seatbelt assembly-driver.
11-21-91	Windsor	Failure/improper use of seatbelt assembly-driver.
01-13-92	Windsor	Suspension of driver's license for failure to pay fine.
09-04-92	Windsor	Speeding 114 KMH in 80 KMH zone.
12-04-92	Windsor	Suspension of driver's license for failure to pay fine.

All of this information was set out in the first Notice of Proposal. Subsequently, the Registrar obtained additional information which caused him to issue the Amended Notice of Proposal. In this Notice, found at tab 1 of Exhibit 5, all of the new allegations are underlined. These fall into three categories, being a number of statements as to details from the Applicant's application and an interview of him by an investigator and the details not mentioned in the original notice, some additional traffic offences and information concerning criminal convictions and charges set out in paragraph 8(a) thereof which reads as follows:

- 8(a) Investigation has revealed that on August 29, 1994, the Applicant was convicted of Possession of a Restricted Drug under s.47(1) of the Food and Drug Act, and fined \$100.00, as well as Possession of Narcotic under s.3(1) of the Narcotic Control Act, and fined \$350.00. Additionally, the Applicant faced a charge of Possession of Marijuana for the Purpose of Trafficking, with a court date scheduled for January 30, 1995, the alleged offense being August 25, 1994.

It came to light at the opening of this hearing that the Applicant had only learned of the Amended Notice of Proposal when he arrived at this hearing. A copy had been sent out on November 17 to an incorrect address and had been returned and it had not reached him. The question arose as to whether the hearing should proceed and deal with this proposal. In considering the question,

the Applicant said the only new allegation which concerned him from this point of view was the last sentence in paragraph 8(a) above dealing with the still pending charge of Possession of Marijuana for the purpose of trafficking.

The statement and details concerning the application form of March 11, 1994 and his interview with the investigator were such that it appeared he could deal with these equally well without an adjournment. A probing of the evidence concerning the new allegations of traffic offenses satisfied the Tribunal that these did not apply to this Applicant, but were those of someone with quite a similar name but a different address and birthdate and nothing more need be said about them. The information in paragraph 8(a) concerning the disposition on August 29, 1994 of the two pending charges mentioned before was well known to the Applicant and he knew when he came to the hearing that he would have to deal with these.

However, he did not know that he would be faced with the issue of the later pending charge. Counsel for the Registrar indicated that, if the Applicant requested an adjournment because of this point, he would not oppose it and such adjournment would have been granted had he asked for it. However, the Applicant said he wished to proceed with the hearing and did not wish an adjournment.

The first witness for the Registrar was Constable Adams of the Essex Police Force who assisted in the execution of a search warrant on February 25, 1994 at premises in Essex where the Applicant was found in possession of a small bag of marijuana and a small plastic bag with 17 "hits" of acid. He was charged with possession of these with the result set out above. It is of some consequence to add that the marijuana came to light first and he was told at that time he would be charged with possession of this. The notice to appear at Court referred only to this charge. I mention this because there is a conflict in the evidence as to whether he was told prior to a court appearance that he would be charged with the second offence. He said he did not know of this until this court appearance which was after filling out the application and after his interview with the investigator and that was why he did not disclose it and denied the second charge in connection therewith.

Constable Adams then went on to state that on August 25, 1994, he received information as the result of which he drove to a street in Essex where he found the Applicant on foot near his motor car and as a result of questions and a search, he found him to be in possession of three small bags of marijuana (nickel and dime bags) and some \$329 in cash. As a result of this, he was charged as indicated above.

The next witness was David Workman, a police officer of 35 years who is now an investigator with the Gaming Control Commission. On March 15, 1994, he had an interview with Mr. Johnston and he reviewed the whole of the application with him. He said that, at the time the Applicant made his answer to question 12, it was correct which indicated that he had not considered the failure to refer to the traffic convictions to be a falsehood in these circumstances.

Mr. Workman brought to the Applicant's attention the fact of the second charge concerning possession of a restricted drug and Mr. Johnston told us that he was not charged with that one. We have already referred to this point above. Mr. Workman then read out the traffic convictions and he admitted that he had these. He asked Mr. Johnston why he drove when his licence was under suspension and he said he just shrugged his shoulders. Mr. Workman also said that the Applicant appeared to belittle the offences by saying they were no big deal. On cross-examination, Mr. Workman said that he may have misunderstood the shrug and that Mr. Johnston may have had no intention of belittling any of this.

Finally on behalf of the Registrar, we have the evidence of Mr. Major himself who has been Registrar since February 1993. He began by explaining the objectives of the Gaming Control Act and his responsibilities as Registrar. Until this Act was in place, this industry was unregulated in Ontario. Charitable gaming, allowed by amendments to the Criminal Code, had grown to over \$2 billion annually in Ontario and there were sufficient incidents of abuses that regulation became necessary. In February 1993, there was added the regulation of Government operated casinos as well, of which to date there is only the one at Windsor.

The employees of the casinos operating for charitable gambling and of the Windsor casino handle large volumes of cash and chips which are in a very real sense public monies. The standard set for honesty and integrity and respect for the rule of law of persons in this industry must be set very high. The purpose of the Act is to prevent cheating and other improper conduct and also to punish it.

Mr. Major told us that the application of Mr. Johnston came to him with Mr. Workman's report. On the basis of this information, Mr. Major reached a conclusion to refuse the registration and issued his Proposal to do so on June 3, 1994. Subsequently, he got the information as to the disposition of the two charges previously pending and the new charge laid on August 25 and he issued the Amended Proposal on November 17.

In his evidence, he gave as his reasons for reaching the conclusion which he did that he had reasonable grounds to believe

that the Applicant would not act in accordance with the standard prescribed by section 11 of the Gaming Control Act were:

1. The fact that, while he had made disclosures, he had not made proper disclosure in answer to question 13 in the application;
2. The fact of the convictions themselves;
3. The driving record which shows lack of proper respect for authority;
4. The fact of the new and serious charge pending.

Mr. Major further stated that his reasons for coming as a witness to this hearing was that he wished to express an opinion upon the facts in addition simply to setting out these facts and his conclusions based upon them in his Proposals. In cases where the latter is all he wishes to present to the Tribunal, he does not come as a witness as the Proposals speak for themselves, but in cases such as this one where he wishes to go further with his opinion on the point he has to come and give this evidence. It is of some importance to understand this in order to draw correct and not incorrect inferences from the Registrar's attendance as a witness at any particular hearing. In this case, he wanted to make it clear that while he attached some weight to all of the points listed above, he attached more weight to the nature of the convictions and to the fact that he had become involved so shortly afterwards in the incident leading to the pending charge than he did to the disclosure which left something to be desired and to the traffic offenses.

In his defence, Mr. Johnston gave evidence on his own behalf. He was born in 1971, completed grade 12 in school and had worked since for his father driving a truck in a construction business. He attended a trade school recently in Windsor called Casino of Excellence and obtained his certificate as a qualified blackjack dealer. He obtained the application for this registration and made the mistake of dealing with it too quickly in order to bring it back the same day. He said he did not give some of the questions enough consideration. He did not think that the question included driving offenses and he said he did not know he had two charges arising from the first incident until his first appearance in Court upon them which was one day after his interview with Mr. Workman. As to the pending charge, he said he was not selling drugs and that the money in his pocket was the result of his having been paid the day before.

Mr. Johnston also called as a character witness Jane Walcott who, although she has known Mr. Johnston for only 3½ years, was able to give some quite good character evidence. Many persons called as character witnesses simply give their own knowledge and opinions of the character of the person in question. She gave evidence that she knows his circle of friends and acquaintances and that he is viewed by people who know him as a good person. He is viewed as being honest, and has a good reputation for honesty and integrity and willingness to help others. She said that the people who know him like him and think well of him.

No reply was called on behalf of the Registrar in response to the evidence on behalf of the Applicant. In this context, it must be noted that we already had the evidence of Constable Adams who gave a different version of Mr. Johnston's knowledge of the second charge resulting from the raid on February 25, 1994.

Upon all of the evidence, the Tribunal must now reach a decision as required of it by section 13, subsections (8), (9) and (10) of the Gaming Control Act which read as follows:

(8) After holding a hearing, the Tribunal may by order,

(a) confirm or set aside the proposed order;

(b) direct the Registrar to take such action as the Tribunal considers the Registrar ought to take to give effect to the purposes of this Act.

(9) In making an order, the Tribunal may substitute its opinion for that of the Registrar.

(10) The Tribunal may attach such terms to its order or to the registration as it considers appropriate.

The grounds upon which the Registrar proposes to refuse the registration are precisely those specified in section 11 of the Act:

11. The Registrar shall refuse to register an applicant as a gaming assistant or to renew the registration of an applicant as a gaming assistant if,

(a) there are reasonable grounds to believe that the applicant will not act as a gaming assistant in accordance with law, or with integrity, honesty, or in the public interest, having regard to the past conduct of the applicant or persons interested in the applicant;

In addition to these statutory provisions, there are some principles of law laid down in the cases involving proposals to refuse or revoke registration in this industry and in other regulated industries in Ontario such as under the Real Estate and Business Brokers Act or the Motor Vehicle Dealers Act. The leading case is that of Re: Brenner a decision of the Divisional Court on an appeal from the Tribunal which had directed a Registrar not to carry out a Proposal under section 7(4) of the Motor Vehicle Dealers Act. (see Re Brenner CRAT 19 (1971-1989) SCO Decisions and Orders p.58).

It appears that the authority, the duties and the discretion of the Registrar and the jurisdiction and powers of the Tribunal at this hearing are the same as those with which the Divisional Court was dealing in the Brenner case. Southey J. deals with the critical point with the following language:

The effect of s.7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

Southey J. then, for reasons peculiar to the facts of that case, sent it back for a rehearing by the Tribunal and said in the third last paragraph:

The proper question at the rehearing remains, however, whether the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

Another principle which I must follow is that it is the past conduct of the Applicant which must be considered and not his present intention no matter how sincere that intention. See the case of Stuart A. Montgomery (1988) 17 CRAT 257.

Other principles I will cite here are that the Tribunal must make its decision upon all of the evidence adduced at this hearing and not just upon what was available to the Registrar when he made his decision, that the primary function of this Tribunal is to protect the public interest and that the overriding consideration must be the question of policy and public perception.

See Giovanni Giannini (1988) 14 CRAT 179:

The primary function of the Tribunal is to protect the public whose members are entitled to the assurance that this regulated industry will be carried on by strictly honest men and women whom they may look to for advice and honest counsel in the course of business with complete confidence.

See Ronald W. Northover (1984) 13 CRAT 292:

The Tribunal finds itself with no option other than to uphold the Registrar's Proposal. This is not because it looks upon Mr. Northover with a particularly dire feeling of disapproval. It is prepared to concede that he has to some extent, quite possibly to a considerable extent, been the victim of bad luck, unfortunate circumstances or factors beyond his control. But the overriding consideration here is the question of

policy and the question of public perception of the policies which will be followed and used as guidelines by the various Registrars who are charged with the responsibility of presiding over the various industries all coming within the jurisdiction of the Ministry of Consumer and Commercial Relations.

I accept the evidence of Jane Walcott that the Applicant is known as being of good character by the people who know him and to quote from the Northover case, I do not look upon Mr. Johnston "with a particularly dire feeling of disapproval." However, in the light of the two very recent convictions for possession of forbidden narcotics and drugs and in the light of the facts upon which the pending charge is based, I cannot look at the critical facts here and say that the Registrar is wrong in his conclusion under section 11 of the Act and that the facts do not give him reasonable grounds for his conclusion.

In this case, I do wish to add that if Mr. Johnston avoids any association with criminal activity in the future, the criminal record which he now has is one which he should be able to overcome for the purpose of such as we have here in a reasonable period of time. How long this period will be will depend a good deal upon the disposition made of the presently pending charge, but at this time I cannot do other than direct the Registrar of Gaming Control, pursuant to section 13(8) of the Gaming Control Act, 1992, to carry out his Proposals and to refuse the registration of this Applicant.

TUYET NGOC LUU

APPEAL FROM A PROPOSED ORDER OF THE
REGISTRAR OF THE GAMING CONTROL ACT, 1992

TO REFUSE REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chair, presiding

APPEARANCES:

TUYET NGOC LUU, appearing on her own behalf
EDWARD WREN, representing the Registrar of
Gaming Control Act, 1992

DATE OF

HEARING: 19 October 1994

Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Commercial Registration Appeal Tribunal arising out of a Notice of Proposal to Refuse Registration of the Applicant as a gaming assistant issued on June 15, 1994. I shall first review the facts presented in evidence.

The appellant was born in January 1963 in Saigon in what was then South Viet Nam. In 1978 or 1979, she lived for six months in a refugee camp in Malaysia and then in 1979 through a Canadian Government program, she and her sister came to Canada. She has had to learn English completely as a second language and has worked hard at it. She completed highschool in English and has taken courses thereafter, in Seneca College to learn accounting, and at Humber College to study law enforcement with a view to working as a customs officer. She is obviously a very good student, excelling in mathematics which does not require language skill, but having some difficulty otherwise, not because of difficulty with other specific subjects but rather because of difficulty with the English language.

Equally obviously, she is energetic and hardworking and very anxious to earn own way and not require any form of welfare. In 1991 she had an opportunity to work as a gaming assistant for BJ Games at the Canadian National Exhibition and she continued in this employment through 1993. She applied to the Registrar, Gaming Control Act for and received her registration which she required for this work. On July 28, 1993, she filed her application for registration as a gaming assistant with the Ministry of Consumer and Commercial Relations on the form prescribed.

Question 5 on this form reads:

Have you or a corporation of which you were an officer or director ever been found guilty or convicted of an offence under any law or are there any charges pending? This includes where a conditional discharge or an absolute discharge has been ordered.

If yes, attach full particulars (offence, dates, police force, disposition) on a separate signed and dated statement.

To this question she answered "No".

The Registrar's office had an enquiry made, as it does with every such Applicant, of the appropriate authorities as to whether she had any criminal record and received a report that she did not. This report turned out later to be incorrect.

Later on the Applicant applied for a position as a floor supervisor at the Windsor Casino and was granted a conditional offer of employment as such, conditional upon her receiving the necessary registration for this from the Gaming Control Commission. On February 23, 1994, she submitted an application for this registration which contained the certificate of her prospective employer of the offer of employment. Question 12 on this form reads:

12. Have you ever been found guilty or convicted of an offence in any jurisdiction?

Note: This includes where conditional and absolute discharge has been granted.

If yes, provide the following information for each conviction or finding of guilt on an attached sheet:

- a) Description of conviction or finding of guilt;
- b) Date of conviction or finding of guilt;
- c) Description of sentence;
- d) Name and address of Court; and
- e) Court file number.

To this question she answered "No".

This time the result of the checking for a criminal record was accurate and disclosed two convictions:

<u>Date</u>	<u>Location</u>	<u>Charge</u>	<u>Disposition</u>
May 25/88 Toronto	Toronto	Fraud s.380	Conditional Discharge & Probation 1 yr.
Feb 02/89 Toronto	Toronto	Fraud under \$1,000	Conditional Discharge & Probation 1 yr.

In the meantime, the appellant had been upgrading her education and training to improve her qualifications for the work she was seeking. By this time, she was living in Windsor and she attended St. Clair College of Applied Arts and Technology and on March 22, 1994, received three certificates from that college as a blackjack dealer, a roulette dealer and a mini baccarat dealer in recognition of her attending and satisfactorily completing the program of study for each of these.

The Registrar had an officer from his office interview the Applicant in Windsor at which time she admitted that these were her two convictions. As a result, the Registrar issued his Proposal to refuse her registration on June 15, 1994 giving as his reason "for the reason that the Applicant is not entitled to registration under section 11 of the Act as there are reasonable grounds to believe that the Applicant will not act as a gaming assistant in accordance with law, or with integrity, honesty, or in the public interest, having regard to the past conduct of the Applicant." In a Statement of Particulars, it was stated:

7. The Registrar has satisfied himself that the Applicant intentionally failed to disclose these findings of guilt, and therefore gave false answers in the application for registration.
8. Under the Gaming Control Act, 1992, and Regulations an applicant for registration must complete an application for registration fully and honestly.
9. As a regulated industry in Ontario, the commercial delivery of gaming services requires the utmost honesty and integrity to be demonstrated by its registrants. The first step in establishing the basic honesty and integrity required is the

truthful completion of the application for registration.

10. In light of the findings of guilt under the Criminal Code against the Applicant, her failure to fully disclose same, as well as knowingly furnishing false information in the application for registration under the Act, the Registrar proposes to order that the Applicant's application for registration be refused.

Also when the information as to these criminal convictions came to his attention, the Registrar issued another Proposal on the same day to revoke the registration which the Applicant had already received as a gaming assistant based on the same grounds. This registration was due to lapse in August 5, 1994 if not renewed and on June 10, 1994, the Applicant was sent a renewal notice which if she had sent it in and filed a notice of appeal from the proposal to revoke this registration, this would have kept the registration in place until the hearing before this tribunal and its decision upon the same. However, the Applicant did not submit the application for renewal and so this registration as a gaming assistant lapsed.

Originally, the matter was listed before the Tribunal as including hearings to held with regard to both Proposals and at the opening of the hearing, a discussion took place as to the proper position of each of them. It was determined that the earlier registration had lapsed on August 5, 1994 and, therefore, there was nothing before the Tribunal with regard to it and that the Tribunal will just proceed with the hearing on the merits regarding the Proposal to refuse the application for registration as a casino employee.

The only witness for the registrar was the Registrar himself. He stated that he had reached his conclusion based upon the past conduct of the Applicant by reason of several concerns. He was concerned that, in completing the two applications forms, the Applicant had not been truthful and had mislead his office, in the one case successfully. He was concerned that the facts in both applications had been attested by Affidavit, so the Applicant had sworn falsely in each of them. He was concerned with the nature of the two offences, both being offences of dishonesty or of fraud, deceit or theft. He was concerned that, in the gaming industry a casino employee, working as floor supervisor will be in charge of operations involving large amounts of cash and valuable chips and that everyone in such a position must operate and must be perceived to operate with the highest integrity.

Mr. Major told the Tribunal that, in the case of applications or positions with a supervisory role, the degree of investigation by his office is higher. Everyone is interviewed personally, a police check is made for any criminal record, a credit check is made, a search of executions, a driving record is obtained and some other inquiries are made as well. In the case of this Applicant, the only problem with this application was that of the existence of the two convictions. Mr. Major also stressed the fact that this is a new area of activity in Ontario and unlike that of persons seeking, for example registration in the real estate business, there is not an established course of training. This places a greater responsibility upon the Registrar in his office with a choice of persons to be registered. Finally he referred, as he has done in other cases, to the significance of the words "all in the public interest" found in section 11(a) of the Gaming Control Act. He said that the addition of these words, not found in similar sections in statutes regulating the registration of persons in other regulated industries add a dimension to the consideration he must give to the requirements placed upon an Applicant by the section. It has frequently been held that such legislation is consumer protection legislation and, in the other cases where these words are not included, the words must be taken to provide protection to the consuming public who avail themselves of the services of the industry in question. With the addition of these words, we are also concerned with the interest of the public at large who do not avail themselves of these services and their stake in having these gaming operations run properly and keeping every form of cheating, fraud, and dishonesty out of them.

The only witness for the Applicant was the Applicant herself. In addition to the evidence providing the information about her which is set out at the beginning of these reasons, she told us of additional hardships and abuse which she had suffered as a refugee and as a result of her difficulties with the language in a strange land. Altogether the Applicant presented herself in a very positive way and light in every respect except for the existence of these two criminal convictions. She gave an explanation in some detail of each of them.

The first of these arose out of her employment as a teller in a bank. Apparently a customer came to her with a utility bill for \$180 and that sum in cash and paid his bill at the bank. When he got his next month's statement, this \$180 was still shown as arrears owing from the previous month. The customer came to the bank about it and as a result of the investigation arising from these facts, it was discovered that the bill had not been processed and she was charged with theft of the money. She was convicted and she told us she made restitution of the \$180. It is of some significance to note that, in giving her explanation of this

matter, she did not in any way deny that she took the money or attempt to blame anyone else or explain away the facts. Indeed, her comment in this context was "I have learned my lesson from these convictions."

The second conviction arose out of the misuse of a credit card. The Applicant had a friend who had less command of English than she had and he had her help him fill out documents and forms which he might require. He had her complete a form to apply for this credit card which he obtained. However, he never used it and decided to send it back and he gave it to the Applicant for this purpose. However, instead of sending it back to the issuer, she permitted another woman, with whom she was rooming to use and this person ran up a considerable number of charges on the card. The original cardholder received a statement for them at the end of the month and immediately questioned the Applicant. She obtained the card back from the roommate and because she felt responsible to the cardholder, she took him to the office of the issuer to explain the whole thing. In the result, the roommate paid the bill and the card was surrendered. However, the Applicant was charged and convicted as shown.

I might comment, at this point, that it is probable there were some other relevant facts because simply, on these facts, one would have expected the roommate to have been the one to be charged. However, this is not a case where I would find the Applicant was not candid or honest with the Tribunal in respect to the evidence. She has real difficulty with English, all of the discussions in the office where she went with the cardholder were undoubtedly in English and all of the evidence given here was in English. She said that she went to give the explanation and took the whole responsibility as hers for what had happened. I draw no inference of anything dishonest in her evidence in this respect, but rather the reverse that she was telling the truth as she understood it.

She explained in some detail that she had gone to her probation officer and asked for help in how she should deal with the questions in these application forms with which we are concerned here and she said that she understood that because of the conditional discharges in both cases and the fact that she had successfully completed probation, she should answer "No". She also said that, after the Proposals were issued and she showed all of the documents to the probation officer, he told her that, because of the wording of question 12 in the application for registration as a casino employee, she should have answered "Yes" to this one. It would appear that the probation officer had not seen the question when he gave her whatever advice he did before she answered it.

There is some important evidence with regard to the question of a pardon for the Applicant. At one point, the Probation Officer advised her to seek a pardon and she wrote to the R.C.M.P. for the necessary information concerning her record preparatory to doing this. The R.C.M.P. replied that a pardon was not required for these offences for which a discharge had been ordered and they treated her letter as a request to have the information removed from her record and indicated that they had done this.

In any event, I am satisfied upon all of the evidence before me at the conclusion of the hearing that the Applicant did not intend to mislead anyone when she filled out these applications and did not knowingly make a false statement. The combination of the language problem and honest misunderstanding between her and the Probation Officer were the cause of these mistakes. Indeed, counsel for the Registrar indicated in his closing argument that he had come quite away to the same conclusion and said that, to uphold his client's conclusion he was relying upon the facts of the convictions themselves with the inference that if they did not support the Registrar's conclusion (which he submitted they did), then he would not argue that it should still stand because of these answers in the applications.

With respect, I have reached the same conclusion and so the decision comes down to whether the past conduct of the Applicant with regard to the existence and circumstances of these two convictions gives the Registrar reasonable grounds for his belief as stated in his Proposal. I have referred to the circumstances, as well as the facts of the conviction, and the only evidence we have regarding such circumstances is that of the Applicant herself. I have already stated that I accept this evidence as being truthful and have given my reasons for doing so.

The foregoing poses the actual decision to be made in the most favourable way possible in all of the circumstances for the Applicant. It still remains a difficult matter in which to find in her favour. The very high standard of integrity which must be observed and which must be perceived to be observed in this industry to which the Registrar referred, the nature of the convictions, and the fact that they are not that many years in the past all represent real difficulties for her case. On the other hand, I must keep in mind that I must make my decision upon all of the evidence at the hearing, a good deal of which was not available to the Registrar when he issued his Proposal. I have no hesitation in saying that, if the only evidence here had been that available to him then, his Proposal would have been upheld here with quite short reasons.

The decision to be made, however, upon all of the evidence we have now is by no means as simple or easy. There are a number of legal principles which I must consider carefully at this point. The first is that laid down by the Divisional Court in Re Brenner CRAT 19 (1971-1989) SCO Decisions and Orders p.58:

The effect of s.7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

Southey J. then, for reasons peculiar to the facts of that case, sent it back for a rehearing by the Tribunal and said in the third last paragraph:

The proper question at the rehearing remains, however, whether the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

An important principle or corollary which has been held to follow from this judgment is that these statutory provisions give to the Registrars of the various regulated industries

certain discretion in reaching a conclusion whether past conduct affords reasonable grounds for a belief that an Applicant will not carry on business as required. These provisions differ in this respect from provisions that a Registrar may refuse or revoke a registration if an Applicant is shown to have carried on in breach of a statute or of Regulations. In the latter case there is no discretion, but it is a straight question of proving the breach. In a number of cases dealing with this point, the Tribunal has held that the discretion is that of the Registrar and not of the Tribunal. See the case of John P. Crone, a decision of this Tribunal released on May 27, 1994. At the bottom of page 5 of the judgment, it is stated:

It is important to understand that clauses (a) and (b) of subsection (1) of Section 6 of the Act, unlike clause (d) thereof give to the Registrar a discretion in determining upon which side of the line the Applicant falls. It is also important to understand that the discretion is given to the Registrar and not to the Tribunal. It is not sufficient for the Tribunal to conclude that it would have exercised the discretion differently. In order to reverse the Registrar's decision, the Tribunal must be able to say that the Registrar was in error in his conclusion and that the past conduct with which we are concerned does not afford reasonable grounds for such a belief.

I must also be cognizant of the principle that the Registrar and the Tribunal have to make its decision based upon the facts of past conduct and not upon statements as to future intentions, no matter how sincere these may appear to be. (see Re: Stuart A. Montgomery (1988) 17 CRAT 257 where the Tribunal says at p.258:

It should be noted that it is the past conduct of the Applicant which must be considered, not his present intent, no matter how sincere that intent. This Tribunal had before it conduct of less than one year to override criminal conduct of 16 years' duration. This Tribunal

finds that this is insufficient time for it to determine in the interest of the Ontario public that it should overrule the decision of the Registrar in refusing registration of the Applicant.

A way of approaching the decision which must be made here which may be helpful is to consider the fact that a large percentage, if not all of the Proposals to Refuse or Revoke Registration by the Registrar of Gaming Control which have come to this Tribunal so far, have been based upon the same ground of past conduct which has consisted of prior criminal convictions and that to my knowledge in one of these so far has the Tribunal overruled the Registrar. From this, it might be concluded that the Registrar is developing a rule that he will not register an Applicant with criminal convictions or at least with convictions in the area of fraud, deceit or theft. An analogy may be drawn to a rule which has been developed by the Registrar of Real Estate and Business Brokers that he will not register anyone who is on probation or on parole. In neither case are these rules set out in legislation or regulations, but they can be clearly enunciated and followed. However, the Registrar of Real Estate and Business Brokers has said that he appreciates that there may well be cases in which an exception should be made to his rule but that no general pronouncement should be made as to such, rather exceptions should only be considered upon the facts of an individual case. This approach by the Registrar of Real Estate and Business Brokers has been noted with approval on more than one occasion by this Tribunal and it has, on occasion, given consideration as to whether an exception should be made in a case before it but, to my knowledge, no such exception has been made up to this time.

Applying this line of reasoning to this case would lead to the conclusion that, generally speaking, the existence of such criminal convictions would preclude registration; however, there may be exceptions to the rule and we must look at the peculiar circumstances here to see if the Applicant should be such an exception. She stated most emphatically and emotionally that she had "learned her lesson" and for reasons indicated above, I find her sincere in that statement.

However, I do have difficulty in being able to say that the Registrar is wrong here in his conclusion upon which he bases his Proposal. It strains credulity that we heard a correct story about the charge for the misuse of the credit card. It does not make sense that upon the facts given to us, the Applicant would be the person charged and not the person rooming with her who was the one who wrongfully used the card. It also strains credulity that a probation officer will advise her to answer question 5 as she did if such officer saw the document or understood what was being

asked. We do not know exactly what the probation officer said or what he or she knew at the time.

The foregoing together with fact of these convictions, both in the area of fraud and theft, and her failure to answer the question truthfully all prevent me from being able to say that the Registrar is wrong in the conclusion which he reached.

Therefore, by virtue of the authority vested in it under section 11 of the Gaming Control Act, 1992, the Tribunal directs the Registrar of Gaming Control to carry out his Proposal.

DANNY PARISI

APPEAL FROM A PROPOSED ORDER OF THE
REGISTRAR OF THE GAMING CONTROL ACT, 1992

TO REFUSE REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chair, presiding

APPEARANCES:

DANNY PARISI, appearing on his own behalf
EDWARD WREN, representing the Registrar of
Gaming Control Act, 1992

DATE OF

HEARING: 2 November 1994

Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Commercial Registration Appeal Tribunal arising out of a Notice of Proposal issued on March 16, 1994 to Refuse the Registration of the Applicant as a gaming assistant pursuant to the provisions of section 11 of the Gaming Control Act.

The Applicant who was born in 1962 has worked and become experienced as a bingo caller and, when the provisions of the Gaming Control Act required persons who wished to do this work in Ontario to have a registration as a gaming assistant, he submitted an application to the Ministry of Consumer and Commercial Relations on its prescribed form. The Affidavit attesting to the truth of its contents was sworn on April 22, 1993 and the date stamp shows that it was received by the Ministry office on May 3, 1993 together with the prescribed fee of \$50.00.

Although there was some problem arising out of his answer to question 9 on the form which deals with his employment history, the real problem with which we are concerned here arises out of his answer to question 5 which reads:

Have you or a corporation of which you were an officer or director ever been found guilty or convicted of an offence under any law or are there any charges pending? This includes where a conditional discharge or an absolute discharge has been ordered. If yes, attach full particulars (offence, dates, police force, disposition) on a separate signed and dated statement.

To this question the Applicant answered "No".

It is the practice of the office of the Registrar of Gaming Control to make a check of the police records as to the existence of any criminal record on the part of all such Applicants and the check in this case disclosed the following criminal record:

<u>Date</u>	<u>Location</u>	<u>Charge</u>	<u>Disposition</u>
Apr.13/81 Toronto	Brampton	Theft Under \$1,000 Sec 294(B)CC	Conditional discharge & 6 mos.probation
Feb 20/90 Toronto	Niagara Falls	Fraud under \$1,000	Absolute Discharge

Ms. Fiona Douglas-Crampton, who is an investigator with the Ontario Gaming Commission and who gave evidence at the hearing first gave the Tribunal some general information concerning the industry and the requirements placed upon bingo callers and the reasons for them. She said that bingo has become a billion dollar business in Ontario. The average gross spent by patrons of bingo games in Ontario is now close to \$1 billion. Ontario is the bingo capital of North America and has more bingo halls than any other Province or state. It is because of the dimensions of this business that the newly enacted statutory provisions and regulations became necessary. Ms. Douglas-Crampton told the Tribunal that the existence of cheating schemes has been increasing and the Ministry has a larger number of these under investigation. These schemes require the collusion of the bingo caller and increased scrutiny is required of those permitted into this employment.

When the Registrar's office had the application and the results of the criminal record searched, Ms. Douglas-Crampton was requested to investigate the matter. She first called Mr. Parisi on the telephone on October 4, 1993. She identified herself and the reason for her call. She enquired about the convictions and he said that they applied to him. She then asked about the answer to question 5 on the application. She said that he was upset and not very co-operative with her from the beginning of the conversation. In response to her question, he first told her he did not understand the question.

By way of explanation of the offences themselves, he said that on the theft charge he did take some tapes out of a car for which he was charged and pleaded guilty to theft and given the sentence shown. On the assault charge, he said he was engaged in an argument with a former common law wife concerning their small

daughter. He was holding a child in his arms when this woman was trying to pull her away and he pushed her and was charged with and pleaded guilty to an assault for which the Court ordered an absolute discharge with no other penalty.

Ms. Douglas-Crampton went on to discuss his employment history because he had not given sufficient details of this in his application. She said that the conversation took quite some time and that the Applicant was very upset and unhappy and unsatisfied. He said that he had never heard of the Gaming Control Act, he said he thought the registration requirements were stupid, he was quite repetitive, saying the same things over and over several times and saying he had to work and that all this was quite unfair and not his fault it took so long to get a registration. Ms. Douglas-Crampton concluded the conversation by telling him that if he felt he could not comply with the Regulations perhaps he should not be in the industry.

On October 7, he called back to inquire whether a decision had been made on his application and she told him that it had and that his application would be refused to which he replied, "He (the Registrar) just screwed me out of a job. The government really sucks." Ms. Douglas-Crampton also contacted one Diane Snow, the general manager of Bingo County in Niagara Falls and learned he had worked there from April 27 to October 4, 1993 as a bingo caller - from August 1 on working illegally as he was then required to have a temporary licence. However, Mr. Parisi did stop immediately on October 4 when he learned, as aforementioned, that he should do so.

It was upon all of the foregoing information that the Registrar made the decision to refuse the registration upon the grounds set out in the Proposal, namely that there are reasonable grounds to believe that the Applicant will not act as a gaming assistant in accordance with law, or with integrity, honesty or in the public interest, having regard to the past conduct of the Applicant or persons interested in the Applicant.

In his defence, the Applicant said he did not know about the Regulations and did not feel a bingo caller should need a licence. He said that the investigator caught him at a bad time when she called - he was not feeling well, he was most concerned to keep working as he had had real trouble with finding work and had found something he liked and was good at doing and was most anxious to keep it. With regard to the answer to question 5, he said he did not read it sufficiently carefully, he made a mistake he said he apologized and there was nothing more he could do about it. He said he filled in the form too quickly. He said he was never trying to cover up anything - he just did not think of it in this way.

The Applicant filed with the Tribunal a letter from the aforementioned Donna Snow in which she described him as a mature, responsible, courteous public service person and said he did his work properly and in difficult situations always remained calm and professional. She said that, if he gets his licence, she would rehire him as he is an excellent bingo caller. He also had a letter from one Joe Harper at Monte Carlo Bingo in Niagara Falls who said of him that he had known the Applicant for fifteen years, he had trained him as a bingo caller and that he is a kind, polite and courteous person and that he would hire him again. Such letters of character reference do not carry the same weight as if the witnesses had appeared and given the evidence subject to cross-examination. Nevertheless, there is a fair inference that they would have given the same evidence in chief. One cannot speculate usefully upon the result of cross-examination. However, some weight should be given to this evidence in these circumstances. When sought, these letters were made available to the Applicant.

In his argument, counsel for the Registrar said that the Registrar's Proposal should be upheld because the Applicant has not taken the whole process sufficiently seriously - that he was wrong to decide for himself that these convictions were not of consequence, that he gave several different and inconsistent reasons as to why he gave the wrong answer to question 5 and that he was to be criticised for working after July 31, 1993 when he required registration.

In his argument, the Applicant said he was not trying to mislead anyone and that on the application form he just made a mistake. He said he takes his job seriously and does things right. He said he never cheated and is good at his job and wants a chance to go back to work.

During the course of the argument the question of a conditional registration came up. The only condition discussed was a condition that, if the Tribunal directed the Registrar to register the Applicant, it might propose a condition that, if during the period of the registration, the Registrar saw fit to issue a Proposal to revoke this registration, it would also be suspended immediately, pending the hearing of any appeal to the Tribunal which the Applicant might take and not follow the usual course of remaining in place until the Tribunal had disposed of the appeal. During this discussion, counsel for the Registrar expressed concern to the Tribunal that it be satisfied that the Applicant understood exactly what this would mean before the Applicant asked if he agreed with such condition. I explained it carefully to the Applicant and he appeared fully to understand it and said that he had no problem in agreeing with it.

Upon all of the foregoing, the Tribunal must now make a

decision as to the order which it should issue. In doing this, it must keep several principles in mind. In the first place, the Tribunal's decision must be made upon all of the evidence and arguments at the hearing and not just upon what was available to the Registrar when he issued his Proposal. Furthermore, the Tribunal should only reverse or vary the decision of the Registrar if it comes to the conclusion that he was wrong in his Proposal. The Act gives to the Registrar a discretion in coming to the conclusion that the past conduct of an Applicant gives him reasonable grounds for a belief that the Applicant will not act in accordance with the standard prescribed. This discretion is that of the Registrar and not of the Tribunal. It is not sufficient for the Tribunal to conclude that it would have exercised the discretion differently, it must be able to go further and say that, on all the evidence, it is wrong to conclude that it is evidence of past conduct which gives reasonable grounds to believe that the Applicant will not act as a gaming assistant in accordance with the standard prescribed by the statute.

The leading case which is frequently cited in support of this proposition is in Re Brenner CRAT 19 (1971-1989) SCO Decisions and Orders p.58. This was an appeal to the Divisional Court from a decision of this Tribunal overruling the Registrar of Motor Vehicle Dealers and directing him to register a registrant whom he had proposed to refuse. In his judgment, Southey J. says:

The powers of the Tribunal on the application are set out as follows in s.7(4):

...direct the Registrar to carry out his Proposal or refrain from carrying out his Proposal and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

The effect of s.7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his Proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to

have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

We are unable to see how the Tribunal could possibly have arrived at the conclusion that the past conduct of Brenner did not afford reasonable grounds as required under s.5(1)(b) and, accordingly, we find that the Board erred in its decision to direct the Registrar to grant a conditional registration.

I also wish to refer to the fact that, to my knowledge, in all of the cases which have come to date to this Tribunal by way of appeals from Proposals of the Registrar of Gaming Control, the basis for the conclusion of the Registrar to refuse a registration has been the existence of a criminal record on the part of the Applicant and to my knowledge, up to this time, none of these appeals have been allowed. It is becoming evident that the Registrar is developing a rule that persons who have criminal records should not be licensed as gaming assistants. With regard to this, I would suggest three points at this time - one, that this is a good rule to apply generally - two, that there probably should be exceptions made to it in appropriate cases - three, that no effort should be made to list such cases or deal with them generally but rather, in appropriate cases, the question should be asked if this is a case for such an exception.

Here we have a case with two convictions, the one involving dishonesty being well over ten years old and not being a major offence and the other being seen of comparatively minor consequence as evidenced by the sentence of the Provincial Court Judge in ordering an absolute discharge. I have no hesitation in saying that if these had been fully disclosed in the first place and we did not have the evidence concerning question 5 in the application and the answer thereto or any of the evidence of attitude and statements on the part of the Applicant during the

investigation, I would have found the evidence did not give reasonable ground for the belief stated in the Proposal and that the Registrar was wrong. The question remains whether I can still say this in the face of the additional evidence.

With some reluctance, I have come to the conclusion that, by reason of the existence of this additional evidence to which I have referred, I am not able to say that the Registrar is wrong in the conclusion he has reached. While I might have exercised a discretion differently than he did here, I am bound to follow the direction of the Divisional Court and not reverse the decision of the Registrar unless I am able to say that he was in error in his conclusion and that there are not reasonable grounds in these facts to support it. Because of the past conduct of the Applicant in giving a false answer to question 5 and in his answers and attitude to the investigator and his statement that he did not feel a bingo caller should require a licence and that he did not know about the Regulations, I can not say there are not reasonable grounds for the Registrar's belief.

Accordingly, the Tribunal by virtue of the authority vested in it by s. 11 of the Gaming Control Act, 1992, directs the Registrar of Gaming Control to carry out his Proposal.

RANDY MURRAY STEINBERG

APPEAL FROM A PROPOSED ORDER OF THE
REGISTRAR OF THE GAMING CONTROL ACT, 1992

TO REFUSE REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chair, presiding

APPEARANCES:

DAVID COHN, representing the Applicant
EDWARD WREN, representing the Registrar of
Gaming

DATE OF

HEARING: 13 September 1994

Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Commercial Registration Appeal Tribunal arising out of a Notice of Proposal to Refuse Registration issued by the Registrar of Gaming on February 25, 1994.

The Applicant is 35 years old, married with four children and has been quite well established in business in Toronto. For quite a number of years, he was a trucking broker working at the Ontario Food Terminal. He was a part owner at different times in two different companies carrying on this business and he has sold out his interest in the later one and now wishes to work as a Gaming Assistant. On August 6, 1993, he completed the prescribed Application Form and on this same date, it was delivered to the Ministry of Consumer and Commercial Relations. His application sought registration as a gaming premises manager, a gaming services employee and a croupier. Prior to completing this form, he telephoned the Office of the Registrar to get advice as to dealing with it and the principal point which he took from that was he should answer all of the questions fairly and honestly. In fact, he did this.

Question 5 in the form reads:

Have you or a corporation of which you were an officer or director ever been found guilty or convicted of an offence under any law or are there any charges pending? This includes where a conditional discharge or an absolute discharge has been ordered.

If yes, attach full particulars (offence, dates, police force, disposition) on a separate signed and dated statement.

In answer to this, he answered "Yes".

<u>Date & Place</u>	<u>Charges</u>	<u>Disposition</u>
Dec.5/78 Toronto	Robbery	5 months & probation
July 17/79 Toronto	Drive while disqualified	Fined \$200 i/d 20 days
Apr. 12/85 Toronto	Engage in bookmaking	Fined \$3,000 i/d 6 months
July 08/87 Toronto	Engage in bookmaking	Fined \$5,000 i/d 6 months
Oct.04/88 Toronto	Placing Bets for consideration	Fined \$3,000 i/d 4 months

Upon receipt of this documentation, the Registrar's office contacted Mr. Steinberg and asked him to attend at the office for an interview. He did this on September 10, 1993 and it happened that the Registrar himself conducted this interview. Mr. Major told him that it was to his benefit that he had made proper disclosure of the facts of the convictions and that he, Mr. Major, wanted to give him an opportunity to discuss them and to give any explanation about them which he might have which would assist him.

Dealing first with the robbery in 1978, Mr. Steinberg pointed out that he was only 19 at the time and the circumstances do appear to be somewhat unusual. Mr. Steinberg said that he was attempting to assist a friend to collect some money from a third party (the victim of the robbery). In his evidence, Mr. Steinberg said he used a tactic to try to procure the money which he admitted he could not justify. He did not tell us what that tactic was. In dealing with this, at one point he also said, "My lawyer (on Legal Aid) did not seem to take a high interest in the case.

At one point in his testimony, the Registrar said that it was his impression during the interview that Mr. Steinberg did not show remorse for his offences. This statement tends to reinforce that impression as it appears as some effort to put some blame for this conviction upon the lawyer. When asked directly during his evidence in chief whether he was remorseful, he said that he was.

This is an issue of some importance. In considering it, I would note that one would not have expected any other answer to the direct question and perhaps more weight should be given to the statements made in other contexts which may throw more light on the issue. To this, however, must be added his statements that, "I think about it a lot and it bothers me" and "It is a blemish on my life I would like to remove but it is not easily removable." While appreciating that an inference might be drawn from this that his remorse is for the fact that he was caught and convicted and not for having committed the offence itself, I would conclude, on all of the evidence on a balance of probabilities, that he does have genuine remorse for his having done what he did in using these "tactics".

The conviction for driving while disqualified is not of consequence either to the Registrar or the Tribunal. The disqualification arose from a failure to pay parking and perhaps some other fines and not from any suspension of licence by reason of a driving offence. The Registrar said he was placing no reliance on this to support his conclusion in the Proposal and nothing further need be said about it.

The last three bookmaking and betting convictions are of considerably more consequence herein. In the interview, Mr. Steinberg told the Registrar that he did commit these and that he knew what he was doing was illegal. In his own evidence at the hearing, he said he knew it was illegal, but was not as aware as he now is as to how wrong it was. His awareness is undoubtedly increased by the potential consequences upon this application. In his evidence, the Registrar said he was substantially swayed in his conclusion by consideration of these gambling convictions, the time spent, the appellant's age at the time, the repetitive nature of them and the fact that the fines imposed on the first and second occasions had not deterred him from doing it again. When he was asked directly for a comparison of these fines imposed with the amount of his profits from these operations, he did not really answer the question, but only said his was a small scale operation and the fines were significant to the amount involved.

There are some other pieces of evidence wherein Mr. Steinberg's credibility must be questioned. On cross-examination, he said that his motivation for doing the bookmaking was partly financial. He gave no suggestion as to what else it could be.

Counsel for the Registrar introduced as Exhibit 7 some documents received from Canada Customs at Fort Erie which disclosed an incident of some relevance. On August 20, 1993, Mr. Steinberg took a friend of his, Michael Mandel in his, Mr. Steinberg's, car to Buffalo, New York to assist him in purchasing certain gaming accessories from a supplier called George and Company. One of the

documents in Exhibit 7 is an invoice dated August 20, 1993 from that company to Fundtimes Games Inc. which was Mr. Mandel's company. This invoice is made out to the company in care of Randy/Mike which are the first names of both of these men. The goods purchased were gaming chips, playing cards and other gaming equipment for a total of \$3,060.20 U.S.

It was the evidence of Mr. Steinberg that these articles were in boxes in the trunk of his car when they approached Canada Customs at Fort Erie and that they had no other purchases in the car. Mr. Steinberg said they told the Customs Officer that they did have purchases to declare and were directed from the line of cars over to another area for this purpose. When they got over there, Customs officials asked to see in the trunk and when they did so, it was Mr. Steinberg's evidence that they took the position that \$1,615.78 was owing on the goods, part of this being duty and part of it a penalty and that \$807.89 was owing for the release of the car. Mr. Steinberg said that when they were being questioned by the Customs office, he was trying to locate a custom broker who was supposed to have been asked by the vendor of the goods, George and Co., to do something about clearing them through customs, but was unable to find out anything in that respect. It was not made clear in any way why this vendor who had sold the goods outright and had been paid for the same had any interest in the problem of the new owners clearing them through customs. In any event, Mr. Steinberg said, that in the result, Mr. Mandel paid the total of the \$2,423.67 by putting it on a credit card or credit cards. At one point, Mr. Steinberg said that he may have paid some of it, but was not sure but later on he said Mandel paid it all. Mr. Steinberg testified that he had no idea at all as to why the Customs officers asked for a penalty and required a payment for the release of the car.

This story strains credulity. There must be more to it than we were told. If two persons in a car indicate to Customs that they have goods to declare and the only goods are in boxes in the trunk and the Customs officers look at them and the invoice for the same which is produced, there would be no reason for them to do other than calculate the duty, collect the same and send the importers on their way. The question of penalties and impounding the car or even of requiring a payment to allow it to continue would never arise. Mr. Steinberg, as a trucking broker, was quite experienced generally in these matters and it is hard to believe that he did not know something more than he told us about this incident. It is a fair inference that, if he chose to hold back some information concerning the importation of gaming accessories into Canada on this occasion, he thought this information would harm his chances of success at this hearing. Also he had no real explanation as to why, if Mandel's company was the only purchaser of the goods, his name "Randy" also appeared on the invoice. The

last sheet on Exhibit 7 is a copy of a card of Mr. Mandel showing him as associated with Fundtimes Games Inc. and it was Mr. Steinberg's evidence that if he is registered, this is one of two employers with whom he expects to work as a Gaming Assistant.

In his evidence, the Registrar stressed that it is his obligation in such a matter to carry out the provisions of section 11(a) of the Gaming Control Act.

11. The Registrar shall refuse to register an applicant as a gaming assistant or to renew the registration of an applicant as a gaming assistant if

- (a) there are reasonable grounds to believe that the applicant will not act as a gaming assistant in accordance with law, or with integrity, honesty, or in the public interest, having regard to the past conduct of the applicant or persons interested in the applicant;

The Registrar said that since 1970 when the Criminal Code was amended to permit gambling to help charities raise money for charitable purposes, it has become a huge industry, there now being \$2 billion a year wagered or bet on charitable gaming in Ontario. The charities operate through volunteers and employ these registered and regulated operators and operator's assistants to carry on this activity. He said there are now 50,000 charities in Ontario involved and some 20,000 businesses and employees of such businesses involved in providing the assistance, all of which are now required to be licensed. He also stressed the fact that while in the casino gambling now being operated in Ontario, the most sophisticated technology is employed to detect and eliminate cheating and dishonesty, in the charitable operations it is not practical to employ this at all and the risk is much greater and, therefore, also is the concern to register only persons who are and who will be perceived to be above reproach.

Mr. Major further referred particularly to the words "or in the public interest" found in the statutes which are not found in similar legislation governing other regulated industries and said that this meant not only that he must protect the interest of the consuming public who avail themselves of the services of this industry, but also the interest of the public at large, including those who do not use these services. By reason of the nature of this industry, when it is allowed to be carried on in Ontario, the public has a real interest in seeing that it is done so with an absence of cheating or other forms of fraud or dishonesty.

The Registrar said that, while he gave the Applicant full credit for having made proper disclosure of his criminal record when he looked at it, with all of the considerations aforementioned, he reached the conclusion that this past conduct on the Applicant's part, gave him reasonable grounds to believe that he would not act as a gaming assistant in accordance with the standards required by the statute.

On the other hand, the Applicant brought some strong evidence in answer to this position. In the first place, he produced a Pardon (see Exhibit 6) from the National Parole Board which states:

The National Parole Board is pleased hereby to grant to

RANDALL MURRAY STEINBERG

a pardon under the Criminal Records Act.

AND this pardon is evidence of the fact that the Board after making proper inquiries, was satisfied that the said

RANDALL MURRAY STEINBERG

has remained free of any conviction since completing the sentence and was of good conduct and that the convictions should no longer reflect adversely on his character and, unless it ceases to exist or is subsequently revoked, this pardon vacates the convictions in respect of which it is granted and, without restricting the generality of the foregoing, removes any disqualification to which

RANDALL MURRAY STEINBERG

is, by reason of the convictions, subject by virtue of any Act of Parliament or a regulation made thereunder.

Attached to this is a list of the four convictions so that it is clear that the Pardon covers all of them.

Next his counsel called, at this hearing, two character witnesses who were quite impressive. One Ronald Abraham, 36 years old, who has worked for many years for the Toronto Better Business

Bureau, has known the Applicant for 20 years. He knows many persons who are mutual friends and acquaintances and told us that Mr. Steinberg is known to be an outstanding, straightforward, and honest person who is very reliable and upon whom one can always count. He said that the Better Business Bureau never had a complaint about him in business and he truly believes that he is honest and has integrity. On cross-examination, Mr. Abraham said his opinion of the Applicant is not changed by what he knows and has learned about these four prior convictions.

The second character witness was Marty York, 37 years old, an associate Sports Editor of the Toronto Globe and Mail. He has known Mr. Steinberg for ten years. He said he found him completely honest and a man of exceptional integrity and a good citizen in the community. He says he never heard a negative comment about him from anyone. Their children are friends and he has allowed his children to spend days with Mr. Steinberg and his family. He has also had business dealings with Mr. Steinberg and he trusts him completely with money and otherwise.

Mr. York told of one unusual incident. In 1988 during the Seoul Olympics, he and Mr. Steinberg went to Las Vegas and Mr. Steinberg made a bet on the race which Ben Johnson won and collected his winnings. Later when Johnson was disqualified, Mr. Steinberg sent his winnings back. Mr. York told another reporter from U.S.A. Today of this when the two of them were together covering the World Series later that year and this resulted in an article in U.S.A. Today, a copy of which is Exhibit 8 herein, and which reads as follows:

Canadian returns his winning bet

Diogenes need look no further. There is an honest man. His name is Randy Steinberg, and he lives outside Toronto.

Steinberg bet \$26 on Ben Johnson to win the 100 meters at 5-2 odds. He got back \$91.

Then Johnson was disqualified for steroids. Las Vegas betting parlors did not change their payoffs. But Steinberg sent back \$65 profit anyway.

Jim Mastroianni, manager of the Last Vegas Hilton SuperBook called it unprecedented.

"I just felt it wasn't honest to keep it," says Steinberg who runs a produce transportation business. "Johnson didn't win."

"The country is greatly disappointed. First Wayne Gretzky got traded, now this.

Its as though Canada doesn't have any heroes left."

Except for Randy Steinberg.

It is surely an unusual circumstance in which a Tribunal such as this is urged to question the honesty and integrity of someone of whom such words have been written.

Upon this evidence and these facts, the Tribunal must now make a decision pursuant to section 13(8) of the Act. This decision must be made upon all of the evidence adduced at this hearing and not upon the information available to the Registrar when he reached his decision as set out in his Proposal.

To begin I have no difficulty in concluding that, were it not for the existence of the three convictions for gambling offences, the decision would be a short and easy one in favour of the Applicant and I doubt whether any Proposal to the contrary would have been issued. Therefore, the first legal question I must address is what is the effect of the Pardon. It was the submission of Mr. Cohn that its effect must be that the Pardon wipes out these convictions completely and they should not be taken into account in any respect either by the Registrar or by the Tribunal. If this is so, the Applicant will succeed to get his registration.

Counsel for the Registrar submitted that the Pardon has no such result and is only an additional element in the Applicant's favour to be taken into account along with the facts of the convictions and all of the other relevant facts. To determine the right of this issue, we start with certain provisions of the Criminal Records Act of Canada. In section 2(1), we find a definition:

"pardon" means a pardon granted or issued by the Board under section 4.1

Section 4.1 reads as follows:

4.1(1) The Board may grant a pardon for an offence prosecuted by indictment or a service offence referred to in subparagraph 4(a)(ii) if the Board is satisfied that the applicant, during the period of five years referred to in paragraph 4(a),

- (a) has been of good conduct; and
- (b) has not been convicted of an offence under an Act of Parliament or a regulation made under an Act of Parliament.

(2) A pardon for an offence punishable

on summary conviction or a service offence referred to in subparagraph 4(b)(ii) shall be issued if the offender has not been convicted of an offence under an Act of Parliament or a regulation made under an Act of Parliament during the period of three years referred to in paragraph 4(b).

The effect of the pardon is set out in section 5 of the Act:

5. The pardon

(a) is evidence of the fact

(i) that in the case of a pardon for an offence referred to in paragraph 4(a), the Board after making inquiries, was satisfied that the Applicant for the pardon was of good conduct, and

(ii) that, in the case of any pardon, the conviction in respect of which the pardon is granted or issued should no longer reflect adversely on the applicant's character; and

(b) unless the pardon is subsequently revoked or ceases to have effect, vacates the conviction in respect of which it is granted and, without restricting the generality of the foregoing, removes any disqualification to which the person so convicted is, by reason the conviction, subject by virtue of the provisions of any Act of Parliament, other than section 100 or 259 of the Criminal Code, or of a regulation made under an Act of Parliament.

Counsel referred to the case of Silver v. Silver 4 W.W.R. 500 and 22 A.R. 235 C.A. in which it is stated:

The granting of a pardon, although having the effect of "vacating" the conviction, does not extinguish the factual events of the offence giving rise to that conviction. Accordingly, pleadings in divorce proceedings which alleged that the applicant's spouse had "been in jail for assault" during certain periods of time, did not violate subs.(2), notwithstanding that the spouse had been granted a pardon for the offences, as there was no

reference to a "conviction" in the pleadings.

A reference is made to this issue in a judgment of the Tribunal released on August 6, 1993 in the case of Raj J. Chopra where the Tribunal says at page 4 thereof:

The Registrar takes the position that the Applicant's pardon is to be considered in the totality of the Applicant's past conduct. However, the pardon does not preclude reliance by the Registrar upon the previous fraud conviction for the Proposal.

Counsel for the Applicant agreed with the Registrar's position that the Pardon is relevant to an assessment of the Applicant's past conduct but is not legally binding upon the Registrar. He argued that some weight should be given to the pardon.

Counsel for the Applicant cited the case of Regina v. Spring 35 C.C.C.(2d) 308 Ont.C.A. in which Brooke, J.A. at p.309:

A matter of importance was pointed out to us in argument. The appellant had previously been pardoned, and the question arose as to whether or not he should be treated as a first offender. We treat him as such because we think the statute gives us this discretion in these circumstances.

It appears from these authorities that it is open to the Tribunal, if it considers this the proper course to follow, to disregard the pardoned offences but, on the other hand, the pardon does not preclude reliance by the Registrar upon the convictions if this appears to be the proper course to follow. In the circumstances of this case, the Tribunal finds that the Registrar is still entitled to look at the convictions as past conduct on the part of the Applicant which he should take into consideration, but he must temper his view of the same by the fact that the National Parole Board has seen fit to issue the Pardon.

The respective responsibilities of the Registrar in issuing his Proposal and the Tribunal in holding this hearing are discussed in a decision in the case of Steven Michael Tot released on August 19, 1994 where the Tribunal says at page 8:

It appears from these provisions (subsections (8), (9) and (10) of section 13 of the Gaming Control Act) that the jurisdiction and powers of the Tribunal at this hearing are the same as those with which the Divisional Court was dealing in the Brenner case.

Southey J. then goes on to deal with the critical point here in the following language:

The effect of s.7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

Southey J. then, for reasons peculiar to the facts of that case, sent it back for a rehearing by the Tribunal and said in the third last paragraph:

The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the

Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

An important principle or corollary which has been held to follow from this judgment is that these statutory provisions give to the Registrars of the various regulated industries certain discretion in reaching a conclusion whether past conduct affords reasonable grounds for a belief that an Applicant will not carry on business as required. These provisions differ in this respect from provisions that a Registrar may refuse or revoke a registration if an Applicant is shown to have carried on in breach of a statute or of Regulations. In the latter case there is no discretion, but it is a straight question of proving the breach. In a number of cases dealing with this point, the Tribunal has held that the discretion is that of the Registrar and not of the Tribunal. See the case of John P. Crone, a decision of this Tribunal released on May 27, 1994. At the bottom of page 5 of the judgment, it is stated:

It is important to understand that clauses (a) and (b) of subsection (1) of Section 6 of the Act, unlike clause (d) thereof give to the Registrar a discretion in determining upon which side of the line the Applicant falls. It is also important to understand that the discretion is given to the Registrar and not to the Tribunal. It is not sufficient for the Tribunal to conclude that it would have exercised the discretion differently. In order to reverse the Registrar's decision, the Tribunal must be able to say that the Registrar was in error in his conclusion and that the past conduct with which we are concerned does not afford reasonable grounds for such a belief.

In that decision at page 14, the Tribunal also dealt with the inclusion in this legislation of the words "or in the public interest" in the following terms:

We have already referred to the words found in section 11(a) of the Gaming Control Act which are additional to those found in other Acts governing regulated industries in Ontario "or in the public interest" and commented that these must add something to what is expressed in those other statutes. All of these other statutes have frequently been called "consumer protection" legislation in judgments of this Tribunal and it has been stated that the principal purpose of the language which we have quoted is to provide protection to the public who avail themselves of the services of the registered persons as consumers of the same. The addition of the words "or in the public interest" broadens the scope of the concern to the interest of the public at large whether they avail themselves of gaming services or not. The evidence called on behalf of the Registrar stressed the public concern with the question of dishonesty in this industry and with the responsibility of the Ministry, if it is to licence such activities, to take all available steps to ensure that persons registered to conduct it are honest and behave accordingly.

On his part, counsel for the Applicant submitted that the reference to the public herein means reference to an informed public and that members of the public who have these facts would not be upset with the registration of the Applicant in this case.

It was further submitted on behalf of the Applicant that the bookmaking offences and convictions are not to be put in the same category of offences of theft or fraud or other material dishonesty. It is common when dealing with the impact of criminal convictions upon the suitability of persons for certain types of employment or certain occupations to make a distinction between such offences and others not involving this type of dishonesty. This is done on the theory that when one is exposed to opportunities for theft, past convictions for the same are of more concern than convictions for offences not related to that. While

it can be argued both ways into which of these categories bookmaking and the placing of bets for consideration should fall, surely there can be no argument that they are of particular concern when considering the suitability of an Applicant to engage in the industry of gaming or gambling.

In taking all of these considerations into account, the Tribunal is not able to say that the Registrar is wrong in his belief that this Applicant will not act as required by section 11(a) of the Act having regard to his past conduct. This is a case in which, if the discretion given to the Registrar had been given to the Tribunal, it might well have reached the opposite conclusion. This is so particularly in the light of the character evidence adduced. But the Tribunal must keep in mind that the character witnesses and the persons in the community of whose opinions they were speaking would not necessarily have any occasion to see the side of the Applicant's character which led him to breach the law before in respect of gambling offences in order to gain illegal income on the side. Neither can the Tribunal overlook the Registrar's concern with the repetitive nature of these three offences, the age of the Applicant at the time and the fact that he knew what he was doing was illegal and that neither this nor the first two fines deterred him. In the Tribunal's view, he could only escape the result on the facts we have here if the Registrar were precluded from relying upon these considerations by the Pardon and I have already found that this is not a legal result of the same.

I would add that the hesitation which I had in coming to this conclusion was lessened by the evidence given by the Applicant concerning the incident of the problem at the border with Canada Customs over the importation, together with Mandel, of the gaming accessories. The story told by the Applicant has to be incomplete and the inference is irresistible that what is missing was thought by the Applicant to be harmful to his case. The most damage done by this to the Applicant's case was done when he testified that he had told us everything and that he had no idea why the penalty was assessed and why the fee imposed for the release of the car. On a balance of probabilities, I find that he did not tell us the whole truth. While this, if it stood alone, might not have been fatal (although it would constitute dishonesty in an answer under oath and also it concerned some dealings involving gaming and gaming accessories and one of the very employers with whom he anticipated working) coupled with the other evidence, it certainly makes it impossible for the Tribunal to say that the Registrar is wrong in the opinion expressed in his Proposal.

I wish to make a brief comment on one other point. While it is not necessary to decide this, in this case, it may well be considered that in giving effect to the inclusion of the words

"that the applicant will not act as a gaming assistant...in the public interest", it should be found that persons with convictions for gambling offences should not be registered as gaming assistants unless and until these are considerably more years in the past or there is some other cogent reason that it is wrong to continue to take them into such account.

Therefore, by reason of the authority vested in it under section 13(8) of the Gaming Control Act, 1992, the Tribunal orders the Registrar of Gaming to carry out his Proposal.*

*The above decision was appealed to the Ontario Court (General Division).
The appeal had not been concluded at the time of this publication.

STEVEN MICHAEL TOT

APPEAL FROM A PROPOSED ORDER OF THE
REGISTRAR OF THE GAMING CONTROL ACT, 1992

TO REFUSE REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chair, presiding
DENISE GIROUX, Vice-Chair as Member

APPEARANCES:

STEVEN MICHAEL TOT, appearing on his own behalf
EDWARD WREN, representing the Registrar of
the Gaming Control Act, 1992

DATE OF

HEARING: 20 July 1994

Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Commercial Registration Appeal Tribunal arising out of a Notice of Proposal issued by the Registrar of Gaming Services on February 18, 1994 to refuse an application by the Applicant as a Gaming Assistant under the Gaming Control Act. We shall first outline the relevant facts.

The Applicant, who was born on June 6, 1966 did not get a good start in life. In his own evidence, he told us he was raised in a poor family by a single mother who was alcoholic and at 15, he went to a foster home which turned out to be bad situation. He later found himself in trouble with the law and was in and out of jail. He became involved with a woman who has caused him a great deal of trouble. However in the last two years, he told us, he has made a real effort to turn his life around with some substantial success. He has been working steadily as a croupier with BJ Games, he has met another woman with whom he has a good relationship, and for two years he has been in no trouble and for the first time in his life he has some confidence in himself and in his future.

He said that the first thing which he has ever done which he enjoys and feels he is good at is dealing cards as a croupier and he is most anxious to be able to continue at it.

As a result of the provisions of the Gaming Control Act and Regulations made thereunder, Mr. Tot was required to make an application to the Ministry of Consumer and Commercial Relations for registration as a Gaming Assistant to act as a croupier. He obtained the necessary form, filled it out on July 29, 1993 and

took the necessary affidavit in support of the facts set out therein and submitted it to the Ministry on July 30, 1993 (see tab 4 of Exhibit 5). In answer to question 9 thereon, he advised that he was employed by BJ Games as a croupier/dealer from August 19, 1992 to the date of this application, but added that he needed a licence to continue.

Question 5 of the application reads:

Have you or a corporation of which you were an officer or director ever been found guilty or convicted of an offence under any law or are there any charges pending? This includes where a conditional discharge or an absolute discharge has been ordered. If yes, attach full particulars (offences, dates, police force, disposition) on a separate signed and dated statement.

To this question, Mr. Tot answered "No". Upon receiving the application, the office of the Registrar had a search made and learned of the following criminal record as set out in the Proposal:

<u>Date</u>	<u>Location</u>	<u>Charge</u>	<u>Disposition</u>
Jan. 13/84	Toronto	Theft under \$200	30 days and 1 year probation
Apr. 09/84	Toronto	Theft under \$200 (3 Charges)	\$50 in default/5 days of each consecutive and probation for 2 years
Dec. 04/87	Toronto	(1) Break Enter and Theft (2) Possession of Property obtained by Crime Over \$1,000	(1-2) 90 days on each consecutive and 2 years probation

(cont'd)

Date	Location	Charge	Disposition
Mar. 17/88	Toronto	(1) Unlawfully At Large (2) Possession of Property Obtained By Crime Under \$1,000 (3) Theft Under \$1,000	(1-3) Suspended Sentence and 36 months probation
Nov. 23/88	Toronto	(1) Assault Sec 245 CC (2) Theft Under \$1,000 (3) Assault Sec 245 CC (4) Possession of Property Obtained by Crime Under \$1,000	(1) 30 days and 2 years probation (2-4) 60 days - Intermittent on each consecutive charge
Oct. 31/89	Toronto	(1) Driving While Ability Impaired Sec 237(A) CC (2) Fail to Comply with Probation Order Sec 666 CC (3) Fail to Attend Court	(1-3) 60 days on each consecutive charge
Nov. 24/89	Toronto	* Mischief	30 days
Jun. 29/90	Toronto	Fail to Comply with Probation Order Sec. 740 CC	Fined \$200 in default 30 days

(see tab 1 of Exhibit 5)

During the course of this hearing, the Applicant produced a copy of a Request for Criminal Record which he had received from the National Parole Board to which was attached a document from the R.C.M.P. entitled "Criminal Conviction, Conditional and Absolute Discharges and Related Information." This document includes at its end a record of two convictions not listed in the record produced by the Registrar in the Proposal. These are recorded as of March 9, 1992 at Toronto and are:

- (1) MISCHIEF OVER \$1000
- (2) ASSAULT SEC 266 CC

It was indicated that the sentence on both charges was:

- (1-2) 45 DAYS INTERMITTENTLY
ON EACH CHG CONC &
PROBATION

After obtaining the criminal record aforementioned, the Registrar's office passed the file to one of its investigators, Fiona Douglas-Crampton who asked Mr. Tot to come in and discuss the

application with her. He did this on September 9, 1993. Her first concern was to establish that the record she had obtained was, in fact, his and he confirmed this. She then said that she was concerned about the failure to disclose his record and his answer "No" to question 5 and also concerned with the record itself. She told him that the Registrar wanted him to have this chance to explain his side of the story.

In reply, Mr. Tot told Ms. Douglas-Crampton that he was under the impression that he had not answered the question, but left the answer blank and further that he had been so advised by his lawyer. She then reviewed the list of convictions with him. Dealing with the January 13, 1984 theft under \$200 conviction, he told her it was a friend of his who stole this money and he, Mr. Tot, was the one convicted and sentenced for it. Regarding the April 9, 1984 conviction, he said he could not remember this one. Regarding the December 4, 1987 conviction, he said this might relate to a flute he took from a school. He said he used to play the flute at school and he took this one - he was not sure if this offence related to this or not. Regarding the March 17, 1988 convictions, he said the first one related to his being late in coming in on an intermittent sentence and the second one may have related to the flute.

Regarding the November 28, 1988 conviction, he said the assault charge related to the woman with whom he had the trouble and the theft charge to a pair of running shoes. The October 31, 1989 conviction related to driving his mother's car while impaired and being late for a Court appearance. He told her that the November 24, 1989 conviction of mischief was wrong because he was only near a group causing trouble, but he was charged and convicted. The June 29, 1990 conviction was for a breach of a term of probation not to go near the woman with whom he had had the troubles and he said he went back to her place to get his belongings.

Ms. Douglas-Crampton further told the Tribunal that working as a croupier would make the Applicant a black-jack dealer, and might also include roulette and baccarat. He would have charge of large sums of money and values of chips under conditions where the security measurers are considerably less effective than in gambling casinos such as those in Las Vegas and Atlantic City. In the latter, there is constant surveillance with video cameras, but this is not possible at the locations where casino operators such as BJ Games set up for short periods of time for charitable organizations or in connection with other functions such as fairs. The only control over a croupier in these circumstances is the surveillance of a manager or other person working for his employer. She said there is usually an average of two such persons per pit and that each pit will have 4 to 6 tables. She said this is an

industry which has problems with theft and the Registrar's office always has a number of complaints under investigation. There are several ways used to steal or cheat - such as hiding chips to be cashed later, or having a friend at the table unknown to the other players and paying him off excessively and splitting with him later. The charities rely heavily upon the operators and are not equally sophisticated in dealing with them. The important conclusion to be drawn from all this is that the operators must be honest and that every reasonable step available to the Registrar must be taken to ensure that they are.

In his Proposal, the Registrar has refused to register the Applicant under section 11(a) of the Gaming Control Act which reads:

11. The Registrar shall refuse to register an applicant as a gaming assistant or to renew the registration of an applicant as a gaming assistant if,

(a) there are reasonable grounds to believe that the applicant will not act as a gaming assistant in accordance with law, or with integrity, honesty, or in the public interest, having regard to the past conduct of the applicant or persons interested in the applicant;

In his Proposal, the Registrar states that "having regard to the past conduct of this applicant, he has reasonable grounds to believe that he will not act as a gaming assistant in accordance with law, or with integrity or honesty or in the public interest." While the Registrar himself did not give evidence at this hearing, we have his Proposal to this effect and we have some additional evidence from Ms. Douglas-Crampton to which we have referred above to the effect that in doing her job, she is particularly concerned with theft related convictions as evidence of dishonesty, with a pattern of such offenses over a period of time such as we have here, with the interval which has elapsed since the last conviction, in this case only since 1992, and with the giving of false answers to question 5 in the application as well as with subsequent explanations given her by the Applicant with regard to this. All of these are matters which the Tribunal considers the Registrar not only can but also should take into account when exercising his discretion in determining whether past conduct of an Applicant affords him reasonable grounds for belief that any Applicant should be refused registration under section 11(a) of the Act.

In addition to the evidence given by the Applicant to

which we have already referred, Mr. Tot told the Tribunal he was very anxious to get this registration so he could continue working and not have to go back on welfare. He said he was out of the troubled life he had led for a number of years and most anxious not to fall back into it.

He said that when he was dealing with the application herein, he did not remember the details of his criminal convictions and had applied to the R.C.M.P. for the same, intending to provide the correct information to the Ministry when he had it and also to apply for a pardon when he would be able to do so. In connection with this evidence, he produced Exhibit 6 aforementioned to help explain what he had done. In doing so, he certainly was not trying to avoid having the Registrar or the Tribunal become aware of the additional convictions listed therein in 1992 which were not in the list set out in the Proposal.

On cross-examination, the Applicant first said he did not remember filling in "No" in answer to question 5 and later admitted that it would have been better to have filled in "Yes", but he feared if he put in that answer he would not be able to continue working which he wanted very badly to do. In another answer, he said he had no idea why he answered "No" to the question. He said that he did recognize that the taking of the Affidavit in support of the application had the effect of his swearing to the truth of the facts set out therein.

Finally, Mr. Tot stressed that BJ Games was prepared to employ him if he is registered, he referred to a letter which is part of Exhibit 2 and he said that the writer of the letter on behalf of BJ Games is aware that he has a criminal record, but not aware of its details.

Upon the foregoing facts, the Tribunal must now reach its decision as to whether it should uphold the Registrar's Proposal, or direct that the Applicant be registered, or direct that he be registered but subject to terms and conditions. There are a number of legal principles which we must taken into account in determining these issues. While there are not a number of authorities based on section 11 of the Gaming Control Act, its wording is very similar to the words in sections to the same effect in statutes controlling other regulated industries in Ontario, including the Real Estate and Business Brokers Act and the Motor Vehicle Dealers Act.

A leading case which deals with some of the basic issues which we have here is that of Re Brenner 19 CRAT SCO Decisions and Orders (1971-1989) p.59, a decision of the Divisional Court overruling a decision of this Tribunal. In a decision issued on April 7, 1983, Southey J. says:

The Registrar proposed to refuse registration because of the existence of the specific circumstances set out in s.5(1)(b) of the Motor Vehicle Dealers Act. I quote that section:

the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

This section differs only from section 11 of the Act with which we are concerned here in the respect that this latter includes the additional phrase "or in the public interest". The addition of these words cannot subtract anything from the burden placed upon an applicant by the section and must be taken to add something to it.

In his judgment, Southey J. goes on to say:

The powers of the Tribunal on the application are set out as follows in s.7(4):

...direct the Registrar to carry out his proposal or refrain from carrying out his proposal and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

Subsections (8), (9) and (10) of section 13 of the Gaming Control Act read:

(8) After holding a hearing, the Tribunal may by order,

(a) confirm or set aside the proposed order;

(b) direct the Registrar to take such action as the Tribunal considers the Registrar ought to take to give effect to the purposes of this Act.

(9) In making an order, the Tribunal may substitute its opinion for that of the Registrar.

(10) The Tribunal may attach such terms to its order or to the registration as it considers appropriate.

It appears from these provisions that the jurisdiction and powers of the Tribunal at this hearing are the same as those with which the Divisional Court was dealing in the Brenner case.

Southey J. then goes on to deal with the critical point here in the following language:

The effect of s.7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

Southey J. then, for reasons peculiar to the facts of that case, sent it back for a rehearing by the Tribunal and said in the third last paragraph:

The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

An important principle or corollary which has been held to follow from this judgment is that these statutory provisions give to the Registrars of the various regulated industries certain discretion in reaching a conclusion whether past conduct affords reasonable grounds for a belief that an Applicant will not carry on business as required. These provisions differ in this respect from provisions that a Registrar may refuse or revoke a registration if an Applicant is shown to have carried on in breach of a statute or of Regulations. In the latter case there is no discretion, but it is a straight question of proving the breach. In a number of cases dealing with this point, the Tribunal has held that the discretion is that of the Registrar and not of the Tribunal. See the case of John P. Crone, a decision of this Tribunal released on May 27, 1994. At the bottom of page 5 of the judgment, it is stated:

It is important to understand that clauses (a) and (b) of subsection (1) of Section 6 of the Act, unlike clause (d) thereof give to the Registrar a discretion in determining upon which side of the line the Applicant falls. It is also important to understand that the discretion is given to the Registrar and not to the Tribunal. It is not sufficient for the Tribunal to conclude that it would have exercised the discretion differently. In order to reverse the Registrar's decision, the Tribunal must be able to say that the Registrar was in error in his conclusion and that the past conduct with which we are concerned does not afford reasonable grounds for such a belief.

A somewhat lengthy review of cases which are of assistance in dealing with this issue here is found in the decision of the Tribunal in the case of John Ernest Barroso (1990) 20 CRAT 422. This was a case where an Applicant for a real estate salesperson's registration had three convictions for possession of narcotics in 1975 and two convictions for trafficking in narcotics in 1983 and also a charge pending at the time he made the application. While he answered "Yes" to the question as to whether he had any such, he made a very partial and incorrect disclosure of details saying, "In 1980 charged and found guilty of a narcotic". After dealing with the Brenner judgment and quoting the passage set out above, the Tribunal, in the Barroso judgment goes on to say at p.429:

This passage would have been of great assistance to Barroso if he had made proper disclosure in answer to question 6,

and the issue had been whether this evidence of prior misconduct and convictions on his part afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. It does not, however, assist him in meeting the Registrar's concern arising out of the misleading answer to the question and the deception practised thereafter, or of meeting the issue which the Tribunal sees as the critical one in this case, and which it has determined in favour of the Registrar.

Counsel for the Registrar cited several cases dealing with the question of proper answers to the questions in the application. In Gilford Garage Service and Ambury in September 1982, the Tribunal stated at page 53 of the report which we have:

The Tribunal is of the opinion that the application is basic to the formation by the Registrar of a judgment, never easy at any time, as to the fitness of an applicant to be registered. He is entitled to a full disclosure of all facts - all the relevant past conduct, upon which to base that judgment. He did not receive that in these instances.

The Registrar did not receive a full disclosure of all facts and all the relevant past conduct in this application from Mr. Barroso.

In the case of Jakobs vs. Registrar of Real Estate and Business Brokers heard in June of 1987, the Tribunal states at page 226 of the report which we have:

A criminal record, of itself, is not necessary a bar to future registration. However, the offences for which Mr. Jakobs was convicted showed a very serious breach of trust. Quite aside from the financial loss suffered by the owners of the stolen diamonds, through his actions, Mr. Jakobs

placed the reputation of his employer in jeopardy. Only the financial loss is being rectified. An overriding principle is that any Applicant must show through a long course of conduct that he or she is a person to be trusted and not unfit to be registered under this Act. "Integrity and honesty" are not merely words. They are standards that must be met. While the onus is on the Registrar to show that a person is disentitled under the Act to registration in the circumstances such as those before us, the Applicant must establish that his conduct and character will be unimpeachable and that there are no reasonable grounds for belief that he will not act in accordance with these standards.

In the case of Williamson vs. Registrar of Real Estate and Business Brokers heard in June of 1987, the Tribunal at p.270 of the report which we have quotes from two previous decisions:

In its decision in the case of Giovanni Giannini (14 CRAT, p.179), the Tribunal stated:

The primary function of the Tribunal is to protect the public whose members are entitled to the assurance that this regulated industry will be carried on by strictly honest men and women whom they may look to for advice and honest counsel in the course of business with complete confidence.

The real estate industry is one in which major transactions involving large sums, often sums representing people's life savings, are involved. Only persons of complete trustworthiness should be considered suitable for registration and certainly not persons with the kind of gross criminal record of which we have heard today...

In the case of Ronald W. Northover (13 CRAT, p.292), the Tribunal's reasons for

refusing to grant registration to an Applicant included the following passage:

The Tribunal finds itself with no option other than to uphold the Registrar's Proposal. This is not because it looks upon Mr. Northover with a particularly dire feeling of disapproval. It is prepared to concede that he has to some extent, quite possibly to a considerable extent, been the victim of bad luck, unfortunate circumstances or factors beyond his control. But the overriding consideration here is the question of policy and the question of public perception of the policies which will be followed and used as guidelines by the various Registrars who are charged with the responsibility of presiding over the various industries all coming within the jurisdiction of the Ministry of Consumer and Commercial Relations.

These principles have been expressed by the Tribunal on many occasions.

Finally, in the case of Doherty vs. Registrar of Real Estate and Business Brokers in November of 1989, the Chairman of this Tribunal dealt with this very point, at the bottom of page 3 of the report which we have:

Mr. Gordon Randall has been the Registrar under the Real Estate and Business Brokers Act since July 1988 and has had some 21 years of detailed real estate experience in his career. He reviewed the grounds for refusal and expressed his concern that Doherty had not been honest and thorough in his answers. The Registrar must be able to rely fully and without question on the answers given on all applications in order to protect the public interest.

The failure of an applicant to properly answer can allow applicants to be registered to the possible jeopardy of the public.

What the Tribunal said on that occasion applies precisely to the situation and conduct of Mr. Barroso.

Another principle which is relevant to our decision in this case is found in the decision in the case Stuart A. Montgomery (1988) 17 CRAT 257 where the Tribunal says at p.258:

It should be noted that it is the past conduct of the Applicant which must be considered, not his present intent, no matter how sincere that intent. This Tribunal had before it conduct of less than one year to override criminal conduct of 16 years' duration. This Tribunal finds that this is insufficient time for it to determine in the interest of the Ontario Public that it should overrule the decision of the Registrar in refusing registration of the Applicant.

We have already referred to the words found in section 11(a) of the Gaming Control Act which are additional to those found in other Acts governing regulated industries in Ontario "or in the public interest" and commented that these must add something to what is expressed in those other statutes. All of these other statutes have frequently been called "consumer protection" legislation in judgments of this Tribunal and it has been stated that the principal purpose of the language which we have quoted is to provide protection to the public who avail themselves of the services of the registered persons as consumers of the same. The addition of the words "or in the public interest" broadens the scope of the concern to the interest of the public at large whether they avail themselves of gaming services or not. The evidence called on behalf of the Registrar stressed the public concern with the question of dishonesty in this industry and with the responsibility of the Ministry, if it is to licence such activities, to take all available steps to ensure that persons registered to conduct it are honest and behave accordingly.

Taking all of the foregoing into account, the Tribunal must reach the conclusion here that it must uphold the Registrar. Upon the evidence we have, we cannot say that the Registrar was wrong in his conclusion that the past conduct of Mr. Tot afforded him reasonable grounds for his belief upon which he proposes to refuse the registration. This being so, we should not interfere with his discretion. Many of the points made in the authorities we have cited support the same conclusion. While we believe that the Applicant has made a sincere attempt to "turn his life around" and

has a sincere wish to lead a better life henceforth, nevertheless it is the past conduct of the Applicant and not present intent, no matter how sincere, which must be considered.

We wish to add that we feel real sympathy for Mr. Tot because of the misfortunes which he has been forced to endure as a child and youth, but we cannot overlook the principles of law to which we have referred which we must apply. We hope that he will continue to keep out of trouble and in due course establish a record of good conduct which will enable him to overcome the legacy of his lawbreaking which presently is such a detriment to him.

Accordingly, by reason of the authority vested in it under section 13(8) of the Gaming Control Act, 1992, the Tribunal directs the Registrar of Gaming Control to refuse the Applicant's registration.

ANDREW ZYLAWY o/a A.Z. DISTRIBUTING

APPEAL FROM A PROPOSED ORDER OF THE
REGISTRAR OF THE GAMING CONTROL ACT, 1992

TO REFUSE REGISTRATION

TRIBUNAL: JUDITH A. KILLORAN, Chair, presiding

APPEARANCES:

WILLIS PYE, representing the Applicant
EDWARD WREN, representing the Registrar of
the Gaming Control Act, 1992

DATE OF

HEARING: 22 June 1994

Toronto

REASONS FOR DECISION AND ORDER

The Applicant appeals the Proposed Order of the Registrar of the Gaming Control Act, 1992 dated May 28, 1993 and an Amended Proposed Order dated March 23, 1994 to refuse him registration as a gaming supplier pursuant to section 10 of the Act.

The Amended Proposed Order was issued for the purpose of correcting some factual errors in the Proposed Order.

The Registrar's refusal is based upon his opinion that there are reasonable grounds to believe that the Applicant will not act as a supplier in accordance with law, or with integrity, honesty, or in the public interest having regard to the past conduct of the Applicant.

The Applicant applied for registration as a gaming equipment supplier on February 25, 1993. The Applicant responded "Yes" to Question 11 of the application which asks: "Has the Applicant been convicted or found guilty of an offence under any law or are there any charges now pending? If yes, attach full particulars on a separate signed and dated statement."

The Applicant provided the following information attached to the application:

Offence Charged: Criminal Code Section 206(1)(b) - (Sell Cards for
Disposing of Property by Mode of Chance)
Police Force: Ontario Provincial Police
Date of Offence: Between December 10, 1991 & April 8, 1992
Date of Summons: June 30, 1992
Result of Charge: Guilty Plea entered

Date of Conviction: November 24, 1992
Date of Sentencing: January 26, 1993
Sentence Imposed: Fine of \$1,000 or 3 months in jail in default of payment of fine.

The charge to which the Applicant pleaded guilty related to the sale of illegal break open tickets (also called Nevada tickets) during a period in April, 1992. A complaint was made in December, 1991 and the charges were laid after an undercover police operation.

The Registrar refused to grant the Applicant conditional registration under the regulations to the Act in light of his past conduct. Therefore, the Applicant was to cease carrying on business as of April 1, 1993.

Sergeant Arnold Stinnissen of the Ontario Provincial Police testified on behalf of the Registrar. He is assigned to the Gaming Section, Anti-Rackets Branch which assists the lottery section of the Entertainment Standards Branch of the Ministry of Consumer and Commercial Relations. He testified concerning his investigation of illegal ticket sales in the London area. He explained that break open tickets are approximately 1 inch by 3 inches in size with five windows; the perforated edges are torn open in an attempt to match combinations. The vendor must be a charitable or religious organization to be licenced as required by the Criminal Code and the tickets must meet the conditions set by the Ministry of Consumer and Commercial Relations.

The terms and conditions under which a break open ticket licence is issued specify that an application shall be made to the local municipal council or to the Lotteries Branch after appropriate approval is obtained from the municipal or band council. Restrictions stipulate that the tickets retail for a maximum of 50 cents and conform with the quantities, prices and prize payouts provided in the terms and conditions found in Exhibit 9, Tab 9.

Sergeant Stinnissen and Detective Sergeant Mel Chivers of the OPP drug squad in London responded to complaints that tickets with a purchase price exceeding 50 cents with prizes in excess of \$100 were being sold, contrary to the required terms and conditions. As a result, there were two purchases arranged by Chivers working undercover and a search warrant executed against 296 McNay Street, which was the residence of the Applicant with a basement office for his business, A.Z. Distributing.

Aero Games was confirmed as a supplier after a search for related documents was conducted at the company's Mississauga address pursuant to a search warrant issued on April 10, 1992.

However, no charges were laid against Aero Games as the tickets supplied by them are distributed to other provinces with differing terms and conditions.

On cross-examination, Stinnissen stated that the Applicant was of the opinion that he had done nothing wrong when he was questioned in the course of executing the search warrant.

Detective Sergeant Chivers testified about his contact with the Applicant in the course of doing undercover work. When buying break open tickets from the Applicant, he testified that he was not asked for his band council number. As well, he stated that at some point, the Applicant declared that he hoped that neither of them ended up in court someday. He assumed from that statement that the Applicant realized that what he was doing was against the law.

Jean Major, the Registrar of the Gaming Control Act, 1992, testified concerning the issues facing the gaming industry. Apparently, the industry has mushroomed over the past five years and he estimated that approximately \$700 million is grossed in sales of break open tickets with a \$2 billion sales total for wagers generally. He explained the process whereby a charity with a licence may approach a distributor or manufacturer for gaming supplies in a quantity specified by the licence.

The Registrar also discussed the transitional period when this unregulated industry moved to being regulated. There was a provision for conditional registration for those gaming suppliers who had been in business prior to February of 1993 and applied within thirty days. The Applicant made such an application within the thirty day period and was refused registration on April 1, 1993 (Exhibit 9, Tab 6).

The Registrar explained that the Applicant's registration was refused due to the nature of his criminal conviction and the recency of that conviction, which was three months prior to his application. He described his contact with the Applicant two or three days after April 1, when the Applicant was understandably upset. The Applicant was concerned because he had contractual commitments and tickets warehoused to fulfil those commitments. As a result, the Registrar asked him to supply a list of all outstanding contracts and such information was sent by the Applicant in mid-April (Exhibit 9, Tab 6).

The Registrar entered into evidence a series of letters from him to the Applicant dated April 1, April 19, April 21, April 22, April 27, and May 27, 1993 (Exhibit 9, Tab 6). As well, the Applicant's letters to the Registrar were entered; his letters were dated April 21, April 26, May 5, May 10 and May 18, 1993. The

letters establish that the Registrar was prepared to permit the Applicant to satisfy contracts made prior to April 1, 1993 for the supply of break open tickets.

However, the letter from the Registrar dated May 27, 1993 states that the Applicant was asked to supply a list of all outstanding contracts dated prior to April 1, 1993, two months had passed and the Registrar continued to receive sporadic invoices as evidence of contractual commitments. For that reason, he denied the Applicant's request to supply any further gaming products or services to any licensee.

The Registrar testified that the Applicant was submitting contracts which the Applicant claimed had been agreed to verbally before April 1, 1993, putting them in written form and then back-dating them. It was his opinion that the Applicant was abusing the courtesy that had been extended to him and was not acting with integrity during the process. He discussed the position of trust held by gaming suppliers and the need to ensure that all money raised for charitable purposes would be used for the stated purpose. He compared a gaming service supplier to a management consultant who must act with the utmost honesty and integrity when advising charities.

On cross-examination, the Registrar was referred to the Applicant's pre-sentence report which was favourable and indicated no need for rehabilitative services. He was questioned as to why this report did not carry more weight with him and why he had not interviewed the Applicant to determine his suitability for registration. The Registrar replied that it was his understanding that the Applicant had admitted engaging in an illegal act and knew that his activities were illegal. He based his conclusions on the statement of Detective Sergeant Chivers about his contact with the Applicant in the course of the undercover operation.

The Applicant testified concerning his employment with Aero Games and his decision to work independently while continuing to obtain products from Aero. He described how in his three years in the gaming industry he worked hard to build up his clientele and increase his earnings each year. He appeared to be industrious and forthright. Not surprisingly, his account of events differed somewhat from the accounts presented by the two OPP officers who preceded him as witnesses.

The Applicant stated that he thought that Chivers was from a reserve and had a band council exemption number which would make it legal to sell the tickets on the reserve. He testified that he did not believe that he was engaged in illegal activities and expressed his regrets about what occurred, including his anger with Aero Games for leaving him "holding the bag". The Applicant

claimed that his remark to Chivers that he hoped he wouldn't see him in court was a warning to him that he had better be restricting his sales to the reserve. He stated that it was not until his arrest that he understood that sections 206 and 207 of the Criminal Code apply to reservations.

This is the first appeal to this Tribunal under the Gaming Control Act, 1992. However, section 10 which is the section relied on by the Registrar to refuse registration is equivalent to similar sections found in other regulatory statutes within the jurisdiction of this Tribunal, most notably section 6 of the Real Estate and Business Brokers Act and section 5 of the Motor Vehicle Dealers Act. For that reason, the Tribunal looks for guidance to the standard of review applied under these similar statutes.

While the Tribunal is sympathetic to the Applicant, the Tribunal is bound by the standard of review established in Brenner 19 CRAT 58 and relied on in Vogelsberg, a decision of the Divisional Court released on February 7, 1994. The proper test as outlined in Brenner is that this Tribunal should only refuse to direct the Registrar to carry out his proposal if it thinks that the Registrar is in error in concluding that the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The Tribunal does not find that the Registrar erred in his conclusion. The Registrar provided reasonable grounds for his decision in his testimony; that is, the Applicant's criminal conviction, the nature of the conviction, the recency of the offence, the nature of the industry and its potential for criminal activity, and the conduct of the Applicant when the Registrar extended him the courtesy of fulfilling any contractual commitments agreed to prior to April 1, 1993. As well, the Tribunal was concerned with the Applicant's tendency to blame others, particularly Aero Games, for his unfortunate situation.

The Applicant's plea of guilty with respect to the criminal offence is an admission to all of the elements of the offence. For that reason, the Tribunal must accept the criminal conviction as it stands. Any defences to the criminal charge are more properly raised in a provincial court and not before this Tribunal.

Therefore, by reason of the authority vested in it under section 13(8) of the Gaming Control Act, 1992, the Tribunal confirms the Amended Proposed Order of the Registrar to refuse the Applicant's registration.

AL'S AUTO PARTS

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REVOKE THE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chair, presiding

APPEARANCES:

ROBERT PIERCE, Registrar under the
Motor Vehicle Dealers Act

No one appearing for the Applicant

DATE OF
HEARING:

21 March 1994

Toronto

REASONS FOR DECISION AND ORDER

This matter came on for hearing on March 21, 1994 in the presence of the respondent, the applicant not appearing.

I accept the evidence of the Registrar and can make no finding other than that the Registrar has proved the allegations contained in his Notice of Proposal.

The Tribunal, therefore, pursuant to the authority vested in it under section 7(4) of the Motor Vehicle Dealers Act, directs the Registrar to carry out his Proposal.

A 1 CAR SALE

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REVOKE THE REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chair, presiding

APPEARANCES:

ADE TAITLBAUM, agent on behalf of the Applicant

ROBERT PIERCE, Registrar under the
Motor Vehicle Dealers Act

DATE OF

HEARING: 24 March 1994

Toronto

REASONS FOR DECISION AND ORDER

This was a hearing before the Commercial Registration Appeal Tribunal arising out of a Proposal to revoke the registration of the Applicant issued by the Registrar of Motor Vehicle Dealers and Salesmen on October 25, 1993.

At this hearing, Mr. Taitlbaum who represented the Applicant advised the Tribunal that the partnership registration of himself and Michael Adler, carrying on business under the trade name of A 1 Car Sale, which held the registration which is the subject matter of this Proposal has been dissolved, that he, Mr. Taitlbaum has incorporated a limited company which he intends to carry on the business of a motor vehicle dealer and that he has applied for a registration as such for that company. In the circumstances, it appears that the registrant which held the registration which is the subject matter of this Proposal no longer exists and that the registration should be revoked.

Accordingly, pursuant to the authority vested in it by Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar of Motor Vehicle Dealers and Salesmen to carry out his Proposal.

Dated at Toronto this 24th day of March, 1994.

BROTHERHOOD AUTO SALES

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REVOKE THE REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chair, presiding
SELWYN CHARLES, Member
FRANK HARTWICK, Member

APPEARANCES:

ROBERT PIERCE, Registrar under the
Motor Vehicle Dealers Act

NO ONE APPEARING FOR THE APPLICANT

DATE OF
HEARING:

22 March 1994

Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Commercial Registration Appeal Tribunal arising out of a Proposal of the Registrar of Motor Vehicle Dealers and Salesmen issued on October 20, 1993 to revoke the registration of the Applicant as a motor vehicle dealer. No one appeared on behalf of the Applicant.

Exhibit 2, the Applicant's notice of appeal gives its address as 1884 Davenport Road, Toronto. Its application to the Registrar for registration indicated that its business address was 24-28 Howard Park Avenue, Toronto. The Notice of Proposal is addressed to the principals in the Applicant company at both addresses.

Exhibit 3 establishes that Purolator Courier attempted to deliver copies of the notice of this hearing to the Applicant's principals at both addresses. At the one address, Purolator's representative was told by someone that the Applicant "had moved a long time ago", and at the other "to return the item to the sender". The Motor Vehicle Dealers Act requires all registrants to keep the Registrar's office advised of any change of address and this Notice was sent to the registered address and to the address set out in the application for this appeal. The Tribunal finds that the responsibility for giving notice of this hearing to the Applicant has been met.

The Registrar advised the Tribunal that in an inspection on March 22, 1993, it was determined that the Applicant was not operating from the premises approved by the Registrar, that there were no vehicles for sale at that address, there was no office for the conduct of business and there was no sign in place as required by the Act and the Regulations.

Accordingly, pursuant to the authority vested in it by Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal.

MARIA DIDASKALOU

IN THE MATTER OF A DECISION
OF THE MOTOR VEHICLE DEALER COMPENSATION FUND
TO DISALLOW THE CLAIM

TRIBUNAL:

DAVID APPEL, Vice-Chair, presiding
JUDITH A. KILLORAN, Chair as Member

APPEARANCES:

PETER F. HABER, counsel, representing
the Applicant

LARRY A. BANACK, counsel, representing the
Motor Vehicle Dealer Compensation Fund

DATE OF

HEARING:

5 November 1993

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a decision by the Board of Trustees of the Motor Vehicle Dealer's Compensation Fund rendered May 28, 1993 disallowing the claim of Maria Didaskalou. The claim was made pursuant to a judgment from the Ontario Court (General Division) rendered by the Hon. Mr. Justice Potts and dated November 17, 1992 ordering Robert K. Melmer, carrying on business as a car dealer, to pay Ms. Didaskalou the sum of \$8,784.00, together with \$2,200.00 for costs fixed on the action. The said amount of \$8,784.00 constituted damages which Didaskalou suffered because the used car she purchased did not function properly. The Fund rejected the claim holding that it did not constitute a claim as contemplated by the Motor Vehicle Dealers Act.

Because both parties agreed to a Statement of Facts and Law, no witnesses testified and the parties proceeded directly to the argument of the case.

The salient facts agreed to are as follows:

1. The Applicant's claim for compensation under the Motor Vehicle Dealers Act is for such compensation, on account of the judgement of the Hon. Mr. Justice Potts, as meets the requirements of the terms of the Compensation Fund all set out in a Schedule to the Regulations under the Motor Vehicle Dealers Act.

2. The Applicant's claim before Mr. Justice Potts was for:
 - a) Damages for breach of the implied warranties set out in section 15 of the Sale of Goods Act; and
 - b) Damages under section 4(1) of the Business Practices Act, including the amount by which the amount paid for the automobile under the contract of sale of the vehicle exceeded the fair value of the automobile received under the agreement;
 - c) Applicant's legal costs and disbursements as assessed by the Court.

3. The Hon. Mr. Justice Potts awarded the Applicant the said damages and costs in his Order dated November 17, 1992.

4. The Applicant's claim against the Fund was for the following amounts:
 - a) Difference between purchase price paid for the automobile and the value thereof, as awarded by Mr. Justice Potts;

\$3,500.00
 - b) Cost of Repairs & Transportation during repairs, as awarded by Mr. Justice Potts;

\$2,254.00
 - c) Legal costs, as assessed by Mr. Justice Potts

\$2,200.00

total \$7,954.00

The Tribunal notes that the amount of the claim presented to the Fund did not represent the total amount awarded by the Hon. Mr. Justice Potts. There was a further amount of \$2,000.00 for punitive damages as well as \$1,030 for prejudgment interest. Counsel for the Applicant stated that the amount of \$1,030.00 for interest was not claimed since it was not permissible under the Act; as to the sum of \$2,000.00 in punitive damages, the Applicant attempted to claim \$700.00 under this heading on the day of the hearing. The Tribunal informed the Applicant, and it is its

judgment, that the said amount of \$700.00 could not be claimed at this time since no claim had first been presented to the Fund. The Tribunal may only hear cases where a claim has been made to the Fund and it has rendered its judgment. Until then, the Tribunal does not have jurisdiction to hear the claim.

The Tribunal finds, furthermore, that making the said claim on the day of the hearing, after the Agreement to the facts, took the Fund by surprise. By the terms of the Act and the rules of procedural fairness, such a claim can only be made by following the required procedures. The Fund, on the basis of the facts before it, as well as the original claim, could not have suspected that such a claim would be presented at this late date.

5. The Fund denied the Applicant's claim on the following grounds:

"..the repairs were not part of the purchase agreement and specifically listed on the Bill of Sale as part of the agreement... In Regulation 665, Terms of the Compensation Fund - Interpretations, a claim is defined as follows; 'claim' means a claim for pecuniary loss arising out of a transaction involving a trade in a motor vehicle..."

Decision letter, Exhibit brief, Tab 2

The matters to be judged by this Tribunal, aside from the judgment already rendered on the \$700.00 in punitive damages asked by the Applicant, are:

1. Do the amounts awarded to the Applicant by the Hon. Mr. Justice Potts to compensate for the difference between the purchase price paid for the automobile and the value thereof and for the cost of repairs and transportation during repairs constitute a claim as contemplated by the Motor Vehicle Dealers Act?
2. If they do, is the Applicant entitled to the legal costs of \$2,200.00 awarded by Mr. Justice Potts?.

1. Does the amount of \$5,754.00 awarded to the Applicant by the Hon. Mr. Justice Potts constitute a claim as contemplated by the Motor Vehicle Dealers Act?

The term "claim" is defined in Section 1 of the Schedule of the Motor Vehicle Dealers Act, Regulation 801, as follows:

"claim" means a claim for pecuniary loss arising out of a transaction involving a trade in a motor vehicle;

Section 12(3) of the Schedule requires that an Applicant proceed against the Fund as follows:

12(3) A customer may make a claim against the Fund where the customer gives written notice of the claim to the Registrar within two years of the participants' refusal or failure to pay, even if the motor vehicle dealer with respect to whom the claim is being made ceased to be a participant after the refusal or failure to pay, and where the claim meets one of the following requirements.

1. The customer has recovered in any court in Ontario a judgment in respect of the claim and the judgment has become final by reason of the expiration of the time for appeal or of having been confirmed by the highest court to which an appeal may be taken and the customer makes an application, supported by the judgment and statement of claim, for payment of the unsatisfied portion of the judgment and costs as assessed.

The parties agreed that the claim itself was made within the proper time limit and that a judgment in proper form was obtained by the Applicant. The Fund, however, takes the position that obtaining a judgment is not sufficient. The items of the judgment must of themselves be of a type for which coverage is provided under the Act. That is why, for instance, the Applicant could make no claim for her interest even though she received judgment for same.

Counsel for the Fund is in agreement that the judgment rendered by Mr. Justice Potts speaks for itself and must be accepted on its own terms.

The position taken by the Fund is that any provision or undertaking not included in a contract of sale is not covered by the Fund. This means that any amounts claimed for breach of implied warranties and/or statutory warranty set out by the Sale of Goods Act and the Business Practices Act would not constitute

pecuniary losses under the Motor Vehicle Dealers Act.

Counsel also stated that since the sales contract itself did not make any promise of repairs, the Applicant had no right to claim the cost of such repairs against the Fund. That is, despite receiving a judgment for such repairs, they did not constitute a pecuniary loss under the Act.

Counsel stated that for the Applicant to be eligible to receive from the Fund the sums awarded by Justice Potts, all applicable implied warranties had to have been specifically written into the contract of sale between the Applicant and the dealer. He stated that as between the dealer and the Applicant, the Applicant would have a recourse for the pecuniary loss resulting from a breach of an implied warranty; but as between her and the Fund, such a claim would not be eligible under the Act.

Counsel went on to argue that certain repairs done were done improperly or tardily; however, in the face of a final judgment, this Tribunal is not permitted to question the basis on which damages were awarded to the Applicant, but only whether such damages constitute a claim under the Motor Vehicle Dealers Act.

The Tribunal also notes that inasmuch as the judgment of Justice Potts was based on damages resulting from breach of warranties under section 4(1) of the Business Practices Act, that counsel for the Fund must be presumed to be taking the position that such business practices have to be included in the contract of sale in order for a claim to be eligible under the Motor Vehicle Dealers Act.

Counsel for the Applicant stated that Didaskalou's losses constituted pecuniary damages and were therefore eligible as claimed under the Motor Vehicle Dealers Act. Nothing in the Act itself excluded this type of damages; moreover, in view of the fact that the Act constitutes remedial legislation, the term pecuniary loss must be given a liberal interpretation.

Black's Law Dictionary, 6th ed., 1990, at p.1131 defines pecuniary loss as follows:

A loss of money, or of something by which money or something of money value may be acquired.

At p.392, pecuniary damages are defined as follows:

Such as can be estimated in and compensated by money; not merely the loss of money or saleable property or rights,

but all such loss, deprivation, or injury as can be made the subject of calculation and of recompense in money. Those damages (either general or special) which can be accurately calculated in monetary terms.

The Tribunal finds that the statutory and implied warranties set out in the Sale of Goods Act and the Business Practices Act form an integral part of the contract of sale between the Applicant and the dealer with respect to the purchase of the vehicle. These clauses do not have to be reproduced in the contract between the dealer and the Applicant in order to form an integral part of that contract. The legislation enacting such warranties specifically incorporates them into all sales contracts.

The Fund, therefore, erred when they restricted the provisions of the contract between the dealer and the Applicant only to that which was expressly written in the said contract. The Fund should also, as required by the law, have included all statutory and implied warranties and conditions as set out by the respective Acts. Once it did so, it would then be in a position to decide whether the amounts awarded for any such breaches constituted claims within the Act.

The only question remaining to be decided by the Tribunal is whether the damages claimed for breach of such warranty constitute a pecuniary loss with respect to the purchase of the vehicle as contemplated by the Motor Vehicle Dealers Act.

There have been no judgments by any higher court on this question. The Tribunal believes and holds that such damages as the excessive price paid for the car and the cost for repairs and transportation do constitute a pecuniary loss for the Applicant. For this reason, the \$3,500.00 awarded as the difference between the purchase price paid for the automobile and the value thereof together with the \$2,254.00 awarded as the cost of repairs and transportation during repairs fall within the term "claim" as defined in section 1 of the Schedule to the Motor Vehicle Dealers Act.

Because this Tribunal and the parties are bound by the final judgment of the Hon. Justice Potts, the Tribunal cannot look behind the judgment to decide whether the Judge erred in awarding damages for both diminution in price and the cost of repairs and transportation while repairs were being carried out. The final judgment itself cannot be varied. The power of this Tribunal is solely to decide whether the damages given constituted pecuniary losses under the Motor Vehicle Dealers Act.

While the Fund appeared to be dissatisfied with the basis

of the Upper Court's judgment, it is the Motor Vehicle Dealers Act which itself requires that a consumer obtain a judgment against a dealer before making any claim from the Fund. It is, therefore, unacceptable that the Fund now complains about the judgment.

2. Is the Applicant entitled to the legal costs of \$2,200.00 awarded by Mr. Justice Potts?.

Section 12(3)(1) of the Schedule of the Motor Vehicle Dealers Act gives a customer the right to make a claim against the Fund for payment of "costs as assessed".

Counsel for the Applicant and the Fund are in agreement that the Hon. Justice Potts fixed the costs to be payable to Applicant's counsel at the time that he rendered his Order.

Counsel for the Fund argued that the sum of \$2,200.00 fixed as costs did not constitute costs "as assessed". He stated that there was two methods for obtaining costs, one as fixed by the trial judge at the conclusion of the hearing and the other as assessed "by the taxation officer after a formal process and hearing by the Master."

Counsel argued that the Applicant should have gone through the taxation process because the Motor Vehicle Dealers Act requires that costs be assessed and not simply fixed by the Judge. The Fund has no right to pay the claim for costs in the face of a statutory provision which was very clear and requires that costs be assessed.

Counsel for the Applicant argued that the fixing of the costs by Justice Potts was analogous to having the costs assessed and therefore fell within Section 12(3)(1) of the Schedule to the Motor Vehicle Dealers Act.

At page 716 of the Rules of Civil Procedure under the heading General Principles, section 57.01(3) reads as follows:

Costs may be Fixed or Assessed

(3) In awarding costs, the court may fix all or part of the costs with or without reference to the Tariffs, instead of referring them for assessment, and where the costs are not fixed, they may be assessed under Rule 58.

The Tribunal finds that the applicable rules in the Rules of Civil Procedure are very clear and set out two methods by which costs may be obtained; viz., they may be fixed or assessed. They

are fixed when awarded by a judge and assessed when set by the Master.

The Tribunal finds that the costs, to be claimable under the Motor Vehicle Dealers Act, have to be obtained by the "assessment" procedure and not as "fixed" by a Judge. The Rules are clear in providing for two different procedures for obtaining costs. The Motor Vehicle Dealers Act is equally clear in requiring that costs be determined by the procedure of assessment. That the intent of the legislators to require the assessment process is rendered even more clear when one remembers that the provisions of the Motor Vehicle Dealers Act were drafted when both methods of determining costs existed. In fact, the word "assessed" replaced the original word "taxed" in the Motor Vehicle Dealers Act when the Rules of Civil Procedure changed the term of art to "assessed" from "taxed". What could more clearly demonstrate that the intent of the legislators were that costs be determined by the "as assessed" process?

Under the circumstances, the Applicant's claim for costs must be refused since the Applicant has failed to follow the procedure required under the Motor Vehicle Dealers Act.

Accordingly by virtue of the authority vested in it by section 15(3) of the Schedule to Regulation 801, of the Motor Vehicle Dealers Act, the Tribunal directs the Board of the Trustees of the Motor Vehicle Dealer Compensation Fund to allow the claims with respect to the difference between the purchase price paid and the cost of repairs and transportation amounting to \$5,754.00 and to disallow the claim for legal costs.

DAVID EASTMAN

IN THE MATTER OF A DECISION
OF THE MOTOR VEHICLE DEALER COMPENSATION FUND
TO DISALLOW THE CLAIM

TRIBUNAL:

GORDON R. DRYDEN, Vice-Chair, presiding

APPEARANCES:

CHARLES RUSSELL, agent for the Applicant

LARRY A. BANACK, counsel, representing the
Motor Vehicle Dealer Compensation Fund

DATE OF

HEARING: 3 May 1994

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from a decision of the Board of Trustees of the Motor Vehicle Dealer's Compensation Fund set out in a letter dated November 15, 1993 from the fund to the Applicant. There are no issues whatever as to the essential facts and, indeed, no oral evidence was called by either party, it being agreed that the hearing should proceed on the basis of a written Statement of Facts filed as Exhibit 6 and the documents contained in an Exhibit Brief filed as Exhibit 7. There are issues however, as to certain inferences to be drawn from some of these facts and, of course, issues of law as to the proper application of the relevant statutory and regulatory provisions to these facts and inferences.

On April 13, 1993, Mr. Eastman entered into a contract in writing with Canadian National Leasing Inc. to provide to him a motor vehicle as described therein as a 1993 Ford Bronco, colour green, with a specified model number. This document was headed "Agreement to Lease" and in the body thereof, there were provisions for a term of 48 months, that it was "open", that there should be a residual guaranteed amount of \$6,700.00, that the base lease rate should be \$455.00, that extra maintenance and insurance should be paid by the lessee, that licence and registration payable upon delivery should be extra, provisions calculating taxes payable, provision for a downpayment of \$5,500.00 and NIL for a security deposit or a last month's payment.

Contrary to the provision that the "down payment" was to be \$5,500.00 and perhaps also to the provision that there was to be

no security deposit, handwritten on the other side are the words "a prepayment deposit received on account of \$5,000.00" (see tab 5 of Exhibit 7). In fact, on April 14, 1993, Mr. Eastman issued to Canadian National Leasing a certified cheque for \$5,000.00 which cheque was paid to it. (see tab 7 of Exhibit 7).

There was a provision in the Agreement signed which stated, "I/We hereby offer to lease from the above leasing company, the following vehicle on the terms and conditions herein set forth". This document clearly indicated that it was not to be a final or definitive lease agreement between the parties because condition #2 provided, "The formal lease agreement will be prepared and typed from the information contained herein and must be duly signed by both the lessee and the lessor. A copy of the formal lease agreement will be given to the lessee upon delivery." After the signing of this document and the payment of the \$5,000.00, Canadian National Leasing Inc. apparently got into financial difficulties, it never delivered the vehicle and the Applicant requested the return of his money. On June 25, 1993, the company issued a cheque in this amount to Mr. Eastman, but it was dishonoured by the bank upon which it was drawn for insufficient funds. Finally the Applicant made this claim upon the Compensation Fund on the 29th of July 1993, on the basis of a deposit paid on an undelivered motor vehicle in the sum of \$5,000.00 against Canadian National Leasing Inc. It was agreed in a Statement of Facts that that company was a registered motor vehicle dealer at the material time.

The foregoing are the relevant facts as established by the admitted statement and documents. Before coming to the issues of the legal results which should flow from these, I should deal with the issue of certain inferences as to its meaning which I was asked to draw from the wording of one of the written provisions of the contract being clause 3 of the terms and conditions of the "offer to lease" term.

"3. Residual None Optional Guaranteed x - Amount \$6,700"

This was a term in a pre-printed contract form provided by Canadian National Leasing Inc. and so, if there is a real ambiguity in it or if it is really open upon a fair and reasonable interpretation to have a meaning which is favourable to the Applicant as well as one which is favourable to the company, then the determination of which meaning should be adopted or which inference should be drawn should be determined in favour of the Applicant pursuant to the contra proferentum rule.

It was urged upon me by the agent for the Applicant that this term was intended to provide and should be read as providing that, at the end of the 48 month's term the vehicle value would be

\$6,700 and that the Applicant would have the right to pay this sum at that time and receive the vehicle and the title thereto outright from the company. He said that this is not an uncommon provision in a motor vehicle leasing contract which makes it, in effect, a contract to lease upon its stated terms and conditions for a specified term with a firm option on the part of the lessee to buy the vehicle at the end of the term at a fixed price.

It was urged upon me by counsel for the respondent that the term has quite a different meaning, namely in providing to the lessor a guarantee by the lessee that, when the term of the lease comes to its end and the vehicle reverts back to the lessor (unless some new contract is made with regard to it), the lessee will take such care of the vehicle that it will be worth at least \$6,700 and, if it is not, the lessee will be in breach of this term and liable in damages therefore to the lessor for the difference.

There appears no doubt that the last stated argument correctly sets out the intention of the company in putting this term into the contract. One must presume it did so in furtherance of and not in diminution of its rights and interest. But this is not necessarily the end of the matter. If it can fairly and reasonably be interpreted the other way by the Applicant reading it, and if there is a real ambiguity resulting then, as aforesaid, the contra proferentum rule should apply. We have no parole evidence on this point and the issue must be determined upon the words of the documents we have in evidence. I have come to the conclusion that the position of the respondent is the correct one for the following reasons.

The term itself in the agreement is so worded that there are three options from which to choose the provision for residual value - "none" in which case presumably no figure would be filled in at the right, "optional" and "guaranteed" in which case a figure would be filled in as was the case here. If the option "none" had been ticked instead of the option "guaranteed", the whole term would have made no sense if the meaning urged on behalf of the Applicant were applied. Secondly, I note that in paragraph 8 of the Statement of Facts it is stated:

8. The Agreement to Lease provided for a base lease rate of \$455.00 and the Applicant guaranteed an end value of the motor vehicle to be \$6,700.00, which terms were determined by the cost of the vehicle and the amount of the prepayment

Exhibit Brief, Tab 5

In agreeing to this Statement of Facts, the Applicant agreed to this statement and it, in effect, is the position of the Respondent. Finally, it appears to me that the meaning which anyone reading the term without any of these considerations or arguments in mind would take from it is the meaning urged on behalf of the respondent rather than the one urged by the Applicant. This last argument could be reversed in an appropriate case where one had admissible parole evidence for instance that the lessor told the lessee at the time of signing that the provision had or included the meaning now sought by the Applicant, but we do not have any such circumstances here.

I must now turn to the legal consequences which would flow from the foregoing. One must begin with section 12(2) of the Schedule to Ontario Regulation 801 made under the Motor Vehicle Dealers Act and headed "Terms of Compensation Fund" which provides:

(2) On and after the 1st day of October, 1986, a customer may make a claim against the Fund where the claim meets one of the requirements set out in subsection (3), even if the motor vehicle dealer with respect to whom the claim is being made is not a participant.

In this case, it is agreed and, therefore, established that Canadian National Leasing Inc. was a participant. Subsection (3) of the same section goes on to provide:

(3) A customer may make a claim against the Fund where the customer gives written notice of the claim to the Registrar within two years of the participants' refusal or failure to pay, even if the motor vehicle dealer with respect to whom the claim is being made ceased to be a participant after the refusal or failure to pay, and where the claim meets one of the requirements:

.....

4. The customer has made payment by way of deposit, down payment or otherwise to a participant with respect to an undelivered motor vehicle and the customer has not received the motor vehicle contracted for or an alternative motor vehicle that is acceptable to the customer and the claim is for a refund of the payment made to the participant where the customer has made a demand for payment from the participant

and the participant has refused without legal justification to make the payment or is unable to pay by reason of bankruptcy or insolvency...

In this case, Mr. Eastman made a payment which is stated in the contract to be a deposit to a participant with respect to an undelivered motor vehicle, he did not get the vehicle or an alternative vehicle, he made a demand for a refund of his deposit and the company without legal justification has not paid it. Therefore, the Applicant has met the requirements set out in clause 4 of subsection (3) of section 12 of the Schedule and he should succeed if he has a claim for this money within the meaning defined in the Schedule. This definition is found in section 1 of the Schedule:

"claim" means a claim for pecuniary loss arising out of a transaction involving a trade in a motor vehicle;

(emphasis on word 'trade' added)

Counsel provided me with two dictionary definitions of "trade". In Houghton Mifflin Canadian Dictionary of the English Language we find:

"trade"

.....
2. The business of buying and selling commodities; commerce.

.....
5. An instance of buying or selling; transaction.

In Black's Law Dictionary of Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern we find:

"trade"

"The act or the business of buying and selling for money; traffic; barter."

The Shorter Oxford Dictionary which gives the history of the use of English words has two rather lengthy passages dealing with this word, one as a noun and the second as a verb. The closest relevant reference to its use as a noun states:

"Passage or resort for the purpose of commerce; hence, buying and selling or exchange of commodities for profit;

commerce, traffic, trading."

Reference to its use as a verb include:

"To have dealings, to treat, to negotiate;" "To employ in trade, to make (anything) the subject of trade, to trade in, to acquire or dispose of (also to trade off) by barter, to buy and sell, to barter or exchange."

I was also referred to certain authorities in which the word "trade" is defined and its meaning delineated. The first was the case of:

1) Paisley v. Nelmes CCC Vol.9 413. In the Judgement, the statement is made: "It is almost unnecessary to point out that "trade" has the technical meaning of buying and selling, vide Harriott v. Amery. L.R. 1 C.P. 148; Re Law Reporting Council, 22 Q.B.D. 279.

The next case cited is that of Tilden-Rent-A-Car v. Keffer (1964) 2 O.R. 80 in which the issue was considered as to whether the renting of cars constituted a trade. At page 82, Bennett, C.C.J. says:

...I also do not believe that the business carried on by Tilden Rent-A-Car Co. is of such a nature as to fall within the scope of the Partnerships Registration Act which is applicable to "every person engaged in business for trading, manufacturing or mining purposes" (s.8(1)). Hope, J., at p. 461 O.W.N., p. 259 D.L.R. discusses the meaning of the word "trading". He cites Higgins v. Beauchamp, [1914] 3 K.B. 1192, at p. 1195: "To my mind a trading business is one which depends on the buying and selling of goods." The renting of cars is therefore not "trading". "Manufacturing" and "mining" obviously are not applicable.

I was also referred to the case of Re Ontario Equipment (1976) Ltd. 33 O.R. (2d) 648 - see the Headnote:

A lease with an option to purchase does not necessarily create a security interest under s. 2 of the Personal Property Security Act, R.S.O. 1970, c. 344 (now R.S.O. 1980, c. 375). Unless the lease in

effect amounts to a conditional sale it is not required to be registered under the Act. Where a substantial sum is payable by the lessee for the exercise of the option, the probable inference is that the transaction is a genuine lease and does not create a security interest.

Per Henry J. at page 649:

Under the open end lease here in issue, the dealer lessor acquired a small truck for lease to its customer, the bankrupt herein, and in September, 1980, leased it for a term of three years to the bankrupt. By the terms of the lease, the lessee is responsible for most of the obligations of ownership including insurance, maintenance, repairs and licensing. At the end of the term the lessor is obliged to sell the vehicle at a price determined by the market and is entitled to recover \$2,500 for itself. If the price is insufficient to provide \$2,500, the lessee must make good the deficiency; if the price exceeds \$2,500, the lessee is entitled to the excess. The customer, the lessee, has the option of buying the vehicle at the best price offered to the lessor - in effect, the right of first refusal at a price determined by the market.

And at page 650 at the bottom:

It is of the essence of a lease intended as security within the meaning of the Personal Property Security Act that the property in the subject of the lease is to pass ultimately to the lessee, who is obliged to pay the lessor what might be reasonably regarded as the purchase price with interest and carrying charges over the life of the lease. In such a case the transaction is not unlike a conditional sale agreement or hire purchase agreement.

What I consider to be a practical definition of the distinction between a true lease and a lease by way of security was adopted in Re Crown Cartridge Corp., Debtor (1962), 220 F.Supp. 914, by Croake

D.J. from the decision of Referee Asa S. Herzog:

The test in determining whether an agreement is a true lease or a conditional sale is whether the option to purchase at the end of the lease term is for a substantial sum or a nominal amount...If the purchase price bears a resemblance to the fair market price of the property, then the rental payments were in fact designated to be in compensation for the use of the property and the option is recognized as a real one. On the other hand, where the price of the option to purchase is substantially less than the fair market value of the leased equipment, the lease will be construed as a mere cover for an agreement of conditional sale.

Taking all of the foregoing into account, I have reached the conclusion that the contract between the Applicant and Canadian National Leasing Inc. was a contract for the lease and not for the sale, conditional or otherwise of the motor vehicle in question and that such a lease arrangement does not constitute a "trade" within the definition of the term as used in the Act and the Schedule to the Regulations.

The document is stated to be an agreement to lease, the principal contracting term on the part of the Applicant is, "I hereby offer to lease from the above leasing company the following motor vehicle on the terms and conditions herein set forth" and there was no right on the part of the Applicant to buy the vehicle at the end of the term for \$6,700 or any other sum. Even if I am wrong in finding that there was no right to buy and that the practical result at the end of the term was that the Applicant would if he wished, purchase the agreement for an additional \$6,700.00, applying the test quoted with approval by Henry J. above, the sum of \$6,700 was a substantial rather than a nominal amount and this was a lease and not a mere cover for a conditional sale.

Referring back to the definitions of "trade", while one of the uses listed in the Oxford Dictionary could be construed widely enough to include such a transaction, the preponderance of the evidence of the history of the use and the meaning to be

attached to the word "trade" and the weight of the judicial authority which we have leads conclusively to a decision that this contemplated transaction did not constitute a trade in a motor vehicle within the meaning of the definition of "claim" used in section 1 of the Schedule "Terms of Compensation Fund".

Therefore, pursuant to the authority vested in it by section 15(3) of Ontario Regulation 801, the Tribunal hereby confirms the determination made of this claim by the Board of the Trustees of the Motor Vehicle Dealer's Compensation Fund.

EUROSPORT FINE CARS LTD.

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REVOKE THE REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chair, presiding
SELWYN CHARLES, Member
FRANK HARTWICK, Member

APPEARANCES: ROBERT PIERCE, Registrar under the
Motor Vehicle Dealers Act

NO ONE APPEARING FOR THE APPLICANT

DATE OF HEARING: 22 March 1994 Toronto

REASONS FOR DECISION AND ORDER

This was a hearing before the Commercial Registration Appeal Tribunal arising out of a Proposal of the Registrar of Motor Vehicle Dealers and Salesmen to revoke the registration of the registrant as a motor vehicle dealer under the Motor Vehicle Dealers Act issued by the Registrar on August 5, 1992. No one appeared at this hearing on behalf of the Applicant.

At the opening of the hearing, the Registrar advised the Tribunal that he had reached a settlement of the issues with the solicitor acting for the Applicant and he filed as Exhibit 7 at the hearing a letter from this solicitor sent by fax transmission consenting that the hearing of the matter be held immediately and that an Order be made in accordance with a letter bearing this date sent by the solicitor to the Registrar.

Accordingly, pursuant to the authority vested in it by Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar of Motor Vehicle Dealers and Salesmen as follows:

- 1) the Registrar will suspend the registration of the Applicant for 90 days from the date hereof;
- 2) provided that the Applicant shall take the necessary measures to comply with the requirements of the Act and the Regulations within 90 days, the Registrar shall forthwith lift the suspension;
- 3) if the Applicant does not take such measures within 90 days hereof, the Registrar may, at any time thereafter, carry out his Proposal.

R.G.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
OF MOTOR VEHICLE DEALERS AND SALESMEN

TO REFUSE REGISTRATION

TRIBUNAL: JUDITH A. KILLORAN, Chair, presiding
SELWYN A. CHARLES, Member
FRANK HARTWICK, Member

APPEARANCES:
W. G., agent for the Applicant
JAMES GIRLING, representing the Registrar under the
Motor Vehicle Dealers Act

DATE OF
HEARING: 24 May 1994 Toronto

REASONS FOR DECISION AND ORDER

R. G. appeals the decision of the Registrar dated October 21, 1993 to refuse him registration as a motor vehicle dealer. In the Notice of Proposal to Refuse Registration, the reasons given by the Registrar were that the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty; and having regard to the financial position of the Applicant, the Applicant cannot reasonably be expected to be financially responsible in the conduct of business. However, at the time of argument, the Registrar took no position with respect to the second ground.

The Registrar testified that the Applicant submitted an application for registration as a dealer under the Act on May 27, 1993. He directed the Tribunal to Exhibit 4, part of which was the application form on which the Applicant had checked the "yes" box in response to Question 10 which was: "Has the applicant ever been found guilty or convicted of an offence under any law or are any charges now pending? This includes where a conditional discharge or an absolute discharge has been ordered. If yes, attach full particulars on a separate signed and dated statement."

The Applicant attached two letters dated January 14, 1993 and March 19, 1993 respectively. The letter dated March 19, 1993 from the law firm of Chris & Volpini revealed that the Applicant had been charged under the Young Offenders Act with the Criminal Code offence of Mischief Under \$1000. This charge stemmed from an incident involving the vandalization of five motor vehicles. The

letter informed the Applicant that the Crown Attorney had approved the implementation of the Alternative Measures program provided that he admitted responsibility for the offence in writing and make restitution for the damages suffered.

The Registrar testified that he was concerned by the contents of the March 19, 1993 letter in that the Applicant's offence involved the use of a firearm and he was advised by his lawyer to make restitution in the amount of \$1,008.35 for the damage caused to one of the vehicles. The Registrar had no evidence that restitution had been made.

The Applicant testified that the firearm in question was a pellet gun and that he had no intention of causing damage. Rather, he was aiming for a field in the distance. On cross-examination, the Applicant testified that he had made restitution in the amount of \$680 as that was the adjusted figure supplied by the insurance company to the Alternative Measures Program. The Applicant went on to say that the gun was not his but belonged to a friend and had been left in his car. He claimed that he was not aware at first that any cars had been damaged and did not find out until his arrest three or four days after the incident.

On cross-examination, the Applicant testified that he had not disclosed traffic offences on his application. When asked, he said that he might have three or four minor infractions, such as seatbelt offences. Counsel for the Registrar noted that a search had revealed a total of seven Highway Traffic Act violations and confirmed with the Applicant that since 1991 he had three convictions for failure to produce a licence and convictions for speeding as well as seatbelt offences. The Applicant explained that he had forgotten about the offences and did not think that they must be disclosed on his application.

The Tribunal found it unfortunate that the Applicant did not produce any proof of restitution having been paid and understands the problem that such lack of documentation may pose for the Registrar's office. However, counsel for the Registrar stated that he would not rely on the second ground for refusal, i.e. that of financial responsibility, and would focus only on the first ground.

The Tribunal notes with approval that the Applicant fully and fairly disclosed his criminal charge on his application. However, there were a number of matters which arose in the course of the hearing which caused some concern to the panel. For example, there were discrepancies between the content of the law firm's letter dated March 19, 1993 and the Applicant's testimony. The Applicant testified that while the gun was not his, he took responsibility for it while the letter stated that he would be harshly dealt with on sentencing as the gun belonged to him and he brought it to the party.

The Tribunal found the Applicant evasive in some of his answers which may be attributed partially to his lack of understanding about the protection afforded him under the Young Offenders Act. It was of particular concern to the Tribunal that not only did the Applicant not disclose the Highway Traffic Act convictions on his application but he diminished the importance of the convictions and said he was only worried about those convictions which had implications for his insurance premium.

The Applicant's father, who acted as his agent, argued that the damage caused as a result of the shooting was accidental. The Tribunal was not so convinced and found it implausible that the Applicant was not aware of the damage caused until three or four days later. The Applicant's father argued that the Applicant had not received any traffic tickets lately and was improving on that score. He explained that the Applicant had rented a shop and parking lot in order to sell cars and had to turn to forming his own construction company when his registration was not approved. He said that the Applicant was hard-working and owed no debts.

The Applicant's father presented a spirited argument in favour of his son's registration. However, the Tribunal is mindful of the test outlined in Brenner 19 CRAT 58 and upheld most recently by the Divisional Court in Vogelsberg, in an oral decision of January 25, 1994. The Tribunal does not find that the Registrar was in error in concluding that the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

However, the Tribunal directs the Applicant's attention to section 8 which states: " A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed."

For the present, however, by virtue of the authority vested in it under section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal to refuse the Applicant's registration.

IACOLUCCI, JOSEPH A. o/a
JASPER MOTORS

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REVOKE THE REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chair, presiding
SELWYN CHARLES, Member
FRANK HARTWICK, Member

APPEARANCES:
JOSEPH A. IACOLUCCI, agent for the Applicant

ROBERT PIERCE, Registrar under the
Motor Vehicle Dealers Act

DATE OF
HEARING: 17 May 1994 Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Commercial Registration Appeal Tribunal arising out of a Notice of Proposal dated August 16, 1993, by the Registrar of Motor Vehicle Dealers and Salesmen to revoke the registration of the Applicant upon the ground that the Applicant is not entitled to registration as he is carrying on activities which are in contravention of the Act or the Regulations and/or is in breach of a term or condition of registration. The evidence establishes the following facts.

In an application for registration dated February 18, 1993, the Applicant indicated its business address to be 931A Weston Road, Toronto. The registration was issued on the basis of this application. Up to the time of the issue of the Proposal, the Applicant did not notify the Registrar of any change of address of his place of business. On July 14, 1993, an inspector from the Ministry of Consumer and Commercial Relations attended at these premises and made a report as follows:

931A Weston Rd., Toronto is presently occupied by TU Auto Services (see attached business card).

One of the partners, Mr. Tran stated, that they have been there a year; that they never heard of Jasper Motors or Joseph A. Iacolucci.

There were no business signs in the area for Jasper Motors, and further, there were

no motor vehicles displayed "for sale".
Incidentally, the metro licence (68-0218495 for TU Auto Services does not provide for car sales.

In fact, the Applicant did rent premises at this location and did carry on his business at this address until about one and a half years ago when the property was sold to new owners who did not want him there. He said that there was a severe language problem in communication with them, they took down his sign and just wanted him out. As a result, the Applicant stopped doing business at the address and he said he stopped doing business pursuant to his registration completely.

The Tribunal wishes to say, at this point, that it found Mr. Iacolucci to be an honest witness and has no hesitation in accepting his evidence. On August 31, 1993, he wrote to the Registrar advising him of what had happened and saying that he was looking for new premises and would inform him immediately when he found them and that, in the meantime, he would not do any business pursuant to his registration. He asked that the Registrar not revoke his licence, but allow him to keep it to use at new premises.

At the hearing, Mr. Iacolucci said that he has not yet found suitable premises and that he has done no business as promised. He said that he is the owner (through a company which he owns and controls) of a property at 916 Caledonia Rd., in Toronto upon which there is presently situated a Sunoco Service Station. Its lease to Sunoco expires on December 31, 1994 and Mr. Iacolucci filed as Exhibit 2 a letter from Sunoco undertaking that it will remove its gasoline storage tanks and its pumps from the premises and refill and compact all disturbed areas and repave the asphalt where necessary and have all of this completed before the end of December of this year. Mr. Iacolucci said that as soon as he gets possession of the premises from Sunoco, he will refurbish the building which is there for his purposes and commence to carry on his motor vehicle business from that address. He said that he will put up the required signs, have the required office and keep the required records there.

Mr. Iacolucci told the Tribunal that he was really sorry for all the trouble which he had caused. He said he had no intention of doing anything illegal and sincerely apologized for anything such which he had done. He urged the Registrar and the Tribunal to allow him to keep his registration with an undertaking not to use it until he would commence to carry on at this new address in January of 1995. On cross-examination, he told the

Registrar that since closing his business he had bought one car at a dealer's auction which he could only attend pursuant to his registration and this was for his own use and he is still driving it.

In his evidence, Mr. Pierce said that he had no evidence of any customer complaint against this Applicant and that the only reason he had for supporting this proposal were the breaches of the Act and the Regulations stipulated, the failure to have premises approved by the Registrar with a sign as required and to carry on the business and have the required records at such premises. He said that if the Applicant were in a position now to have an acceptable new premises in place in, say, 30 days, he would probably ask for a suspension for such interval and then if he had everything else in order, allow him to continue with his present registration. However, in view of the fact that he has held the registration illegally from between one and one-half years, and the fact that he never notified the Registrar's office as required of a change in circumstances and the fact that one cannot know if there will be a further delay in the premises on Caledonia Rd. being ready for this operation, Mr. Pierce said and argued that the proper procedure should be that he carry out his Proposal and that as soon as he is in a position to open up again, he should re-apply for a new registration. Mr. Pierce said that, as far as he is concerned, other things being in order, he would approve such an application and that, in the unlikely event that he is not still Registrar at the time, all of this information would be in the file and, therefore, any successor would probably do the same.

Mr. Pierce stressed particularly the fact that the Ontario Government has gone to a great deal of trouble and expense to get control of this business and particularly the sale of used motor vehicles and that it is just the wrong signal to send that registrants can hold licences for appreciable periods of time when not in compliance with the Act and the Regulations.

Mr. Iacolucci argued that he should not have to pay the new fees required on a new application and Mr. Pierce pointed out that, by the time he can start up again it would be almost time to apply for a renewal of the registration so the only real extra cost would be the payment into the Compensation Fund and this would be a small penalty to pay for what admittedly is a not so serious infraction of the Act and the Regulations.

The Tribunal has come to the conclusion that it should uphold the decision of the Registrar in this matter. If the decision had no implications beyond the Applicant in this proceeding, we might well have provided for suspension and allowed

the Applicant to keep the registration and recommence business pursuant to it once he had premises approved by the Registrar and was in compliance with the Act and the Regulations. However, we must be mindful of the fact that the first objective of the Act is consumer protection and that the Registrar has a most extensive task in enforcing its provisions and very limited resources for carrying them out. While in this case, we are satisfied that this Applicant has not abused the situation by carrying on business under the Regulations while not entitled to do so and that he will continue to behave properly in the seven or eight months or so still to go under such a situation, we know that the Registrar just does not have the ability to regulate persons who are found in such circumstances in Ontario and that the only way he can do so is to enforce the provisions of the Act and the Regulations as they exist from time to time.

Accordingly pursuant to the authority vested in it by Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar of Motor Vehicle Dealers and Salesmen to carry out his Proposal.

N & R OF ONTARIO

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REVOKE THE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chair, presiding

APPEARANCES:

NORMAN J. LOWE, appearing on his own behalf

GEORGE GLASS, representing the Registrar under the
Motor Vehicle Dealers Act

DATE OF

HEARING: 30 November 1993

Toronto

REASONS FOR DECISION AND ORDER

This matter came on for hearing on November 30, 1993 in the presence of counsel for the respondent and with the appellant appearing on his own behalf.

Evidence adduced by the Registrar and not refuted by the appellant, together with the failure of the appellant to offer any evidence compels this Tribunal to direct the Registrar to carry out his Proposal.

NOVOSKY, PETER NICHOLAS o/a
PETE'S USED CARS

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REVOKE THE REGISTRATION

TRIBUNAL: JUDITH ANN KILLORAN, Chair, presiding

APPEARANCES:

ROBERT PIERCE, Registrar under the
Motor Vehicle Dealers Act

DATE OF

HEARING: 23 March 1994

Toronto

REASONS FOR DECISION AND ORDER

This was a hearing before the Commercial Registration Appeal Tribunal requested by the Applicant to appeal the Proposal dated August 18, 1993 to revoke his registration as a motor vehicle dealer. As evidenced by Exhibit 2, a copy of the Appointment For and Notice of Hearing was sent by the Tribunal to the Applicant on February 7, 1994 at his address of 83 Colborne Street East, Orillia, Ontario. The Applicant did not appear at the hearing.

At the hearing, the Registrar under the Motor Vehicle Dealers Act made submissions and referred the Tribunal to Exhibit 1, which was a copy of the Applicant's request for a hearing together with the Proposal. Upon reading the documentation filed and upon considering submissions of the Registrar, the Tribunal pursuant to the authority vested in it under section 7(4) of the Motor Vehicle Dealers Act, directs the Registrar to carry out his Proposal.

OKE, RONALD o/a
OKE AUTO SALES & LEASING

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REVOKE THE REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chair, presiding
SELWYN CHARLES, Member
FRANK HARTWICK, Member

APPEARANCES:
RONALD OKE, agent for the Applicant

ROBERT PIERCE, Registrar under the
Motor Vehicle Dealers Act

DATE OF
HEARING: 17 May 1994 Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Commercial Registration Appeal Tribunal arising out of a Notice of Proposal dated October 25, 1993, issued by the Registrar of Motor Vehicle Dealers and Salesmen to revoke the registration of the Applicant as a motor vehicle dealer.

At the hearing, the parties reached an agreement as to the order which the Tribunal should make concerning this matter.

Accordingly pursuant to the Agreement reached, as aforementioned, and pursuant to the authority vested in it by Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar of Motor Vehicle Dealers and Salesmen as follows:

- 1) The Registrar shall allow the Applicant to continue to operate pursuant to its registration for a period of 30 days from this date;
- 2) If, within 30 days, the Applicant has satisfied the Registrar that he has premises which the Registrar will approve, the Registrar should not carry out his Proposal;
- 3) If, at the end of 30 days hereafter, the Applicant does not have premises which the Registrar will approve, the Registrar should carry out his Proposal.

RICE RENTALS LTD.

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REVOKE THE REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chair, presiding
SELWYN CHARLES, Member
FRANK HARTWICK, Member

APPEARANCES: L.G. RICE, agent for the Applicant

ROBERT PIERCE, Registrar under the
Motor Vehicle Dealers Act

DATE OF
HEARING: 17 May 1994 Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Commercial Registration Appeal Tribunal arising out of a Notice of Proposal dated October 21, 1993, issued by the Registrar of Motor Vehicle Dealers and Salesmen to revoke the registration of the Applicant as a motor vehicle dealer under the upon the Motor Vehicle Dealers Act upon the grounds that, the Applicant is carrying on activities which are in contravention of the Act or of the Regulations and/or is in breach of a term or condition of registration.

On May 25, 1993, the Applicant submitted to the Minister of Consumer and Commercial Relations an application on the prescribed form for the renewal of its registration as a motor vehicle dealer and gave thereon as its business address Rice Rentals Ltd., 100 Emby Drive, Unit B, Mississauga, Ontario. This is the same address as that shown on a letter written on January 5, 1994 from the Applicant to the Registrar. The course of action of the Registrar herein was begun by an inspection of the premises by an inspector who found the door of Unit B at that address locked and no sign or any evidence of the Applicant carrying on business at that address. A further search showed that this company had occupation of another unit, Unit J, at the same address but it did not have a telephone there and not very much by way of an office.

In his evidence to the Tribunal, Mr. Rice, President of the Applicant company, said that he had carried on the business from Unit J for a number of years, but in May of 1993, the City of Mississauga refused to renew the Occupancy Permit for these

premises because of parking problems. The City suggested that the Applicant transfer to Unit B at the same premises for which premises it was prepared to issue the necessary Permit. The Applicant entered into an agreement with the landlord to rent these premises and showed this address on the documents for the Ministry aforementioned. But another tenant which was occupying the Unit at the time refused to move out in response to a notice to that effect given by the landlord and the Applicant could not move in. This was the situation at the time of the inspection.

Eventually, the other tenant did move out in September 1993 and the Applicant then occupied these premises at Unit B, put up a sign over the door and opened an office there. At the hearing, Mr. Rice filed photographs, Exhibit 7A through C showing Unit B which shows a building with a large roll-up door opening into a lighted garage where cars are parked and over this door a sign "Sales & Leasing/Lease to Own" and a small door to its left for people to enter with a sign above it "Rice Rentals Ltd.-540-4545. He filed a second set of photographs, Exhibit 8A through C, which show these same premises in the background and another building in the foreground which was said to contain Unit J and in front of which a number of cars are parked. On this building is displayed a sign much more prominently visible to the street and to passers-by which reads "Dr. H, Used Cars (in red letters) Honda, Chrysler Parts Service".

In his evidence, Mr. Rice said that the only business telephone he has is a cellular phone in his briefcase and he carries all of his current records in his briefcase and keeps all past records at his home. He considers records to be past rather than current once a transaction upon which he is working is completed and the documents are signed, and he then transfers the papers from his briefcase to the cabinet with his records at home. He says that he does not do any advertising. He said that the bulk of his business was in exporting vehicles and that he would only personally attend at these premises perhaps twice a month. He said that no customers are invited to these premises. He said that he rarely does a lease in his own name, but rather through a larger dealer.

In his argument, Mr. Pierce submitted that the operation being carried on by the Applicant is clearly in breach of section 13(4) of Ontario Regulation 801 made pursuant to the Motor Vehicle Dealers Act which reads:

It is a condition of registration as a motor vehicle dealer that the motor vehicle dealer,

- (a) operates from premises located in Ontario that are approved by the Registrar;
- (b) has an office for the conduct of business at each premises where the motor vehicle dealer operates;
- (c) has erected at each premises where the motor vehicle dealer operates, a sign that is clearly visible to the public that identifies the motor vehicle dealer's registered name.

It is clear that for a good period of time, this Applicant was not operating from the approved premises at Unit B and he did not notify the Registrar of this as required. Having seen what he now has of these premises, the Registrar said that he is not at all sure that he would approve them. More seriously, it is clear that the Applicant has never carried on his business from the approved premises. He does not operate from there, he has no telephone there, he does not keep any records there, he seldom deals with customers there, and it is even questionable if his "sign" complies with the requirement. To the extent that the evidence establishes any location where he carries on his business, this location is his home rather than those premises - that is where he keeps his records, he is obviously there much more of the time than at these premises, that is where he receives FAX messages in answer to a number printed on his card. To the extent that he is using his home as business premises, it is a clear violation of the definition of business premises in section 1 of the Act - "business premises" does not include a dwelling.

The Tribunal agrees with the Registrar that we have here a clear example of the type of operation which the Registrar has gone to a great deal of trouble and expense to eradicate from Ontario. No one can tell or find out without a great deal of detailed investigation what business this Applicant is doing pursuant to its registration, no one can see or tell without similar investigation with what vehicles it is dealing or in what name or names they are registered, or whether the legal requirements with regard to the condition of the vehicles, or with regard to disclosure to purchasers, or with regard to required taxes to be paid are being met or not.

Accordingly, pursuant to the authority vested in it by section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal.

S. AND L. INVESTMENTS LIMITED

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REVOKE THE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chair, presiding

APPEARANCES:

S. PLIAKES, its agent

ROBERT PIERCE, Registrar under the
Motor Vehicle Dealers Act

DATE OF

HEARING: 21 March 1994

Toronto

REASONS FOR DECISION AND ORDER

This matter came on for hearing on March 21, 1994 in the presence of the respondent, the applicant appearing unrepresented.

I accept the evidence of the Registrar and not refuted by the applicant and can make no finding other than that the Registrar has proved the allegations contained in his Notice of Proposal.

The Tribunal, therefore, pursuant to the authority vested in it under section 7(4) of the Motor Vehicle Dealers Act, directs the Registrar to carry out his Proposal.

ISAAC SCHLUSSELBERG

APPEAL FROM A PROPOSAL BY
THE REGISTRAR UNDER THE
MOTOR VEHICLE DEALERS ACT

TO REFUSE REGISTRATION

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding

APPEARANCES: ISAAC SCHLUSSELBERG, on his own behalf

JAMES GIRLING, counsel, representing the
Registrar under the Motor Vehicle Dealers Act

DATE OF
HEARING: 10 May 1994 Toronto

REASONS FOR DECISION AND ORDER

Mr. Schlussselberg appeals a Proposal, dated October 21, 1993, by the Registrar under the Motor Vehicle Dealers Act to deny him registration as a salesperson.

The Registrar bases his Proposal upon section 5(1)(b) of the Act, asserting that the past conduct of the Applicant affords reasonable grounds for the belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

In the view of the Registrar, the relevant past conduct is the Applicant's conviction in the U.S. in 1991 for conspiracy to traffic in narcotics and his subsequent release on parole in 1993; the Applicant will remain on parole until 1997.

The facts are not disputed. Mr. Schlussselberg was previously registered under the Act from 1982 to 1984, at which time his registration was voluntarily terminated.

He testified that in 1990, when he was operating a restaurant business in Florida, he introduced an unemployed friend to his brother-in-law, who required the services of a driver. In the words of Mr. Schlussselberg, "unfortunately, the business in which they entered was smuggling", specifically, 3 kilograms of cocaine. He stated that the police regarded him as the one responsible for introducing the parties. Consequently, he was tried with his brother-in-law in Buffalo, with both pleading not guilty. He stated the subsequent trial lasted 1.5 months, after which he was convicted on February 8, 1991, of conspiracy to traffic in narcotics. He was sentenced to 6.5 years and did not appeal.

Mr. Schlusberg stated that he immediately applied for the prisoner exchange program to return to Canada. He agreed that good conduct on his part was one of the criteria for such an exchange, which ultimately took place in January 1993. He remained in a minimum security facility until June 11, 1993, when he was released on parole, where he will remain until 1997.

The Applicant testified to his efforts to secure employment. He said he tried to enter the fields of real estate, limousine and taxi driving, but he said he was rejected because of his criminal record. He stated he is now on welfare and trying to support his family, including 2 children.

Mr. Schlusberg's efforts included submitting an application for registration, dated July 6, 1993, to be licensed as a salesperson under the Motor Vehicle Dealers Act. That application, entered into evidence, shows that Mr. Schlusberg answered both "yes" and "no" to question 10, which asks for disclosure of convictions or pending charges. The Applicant also wrote under question 10: "not in Canada, U.S. only charges".

Counsel for the Registrar attempted to establish that the Applicant's disclosure on this application was misleading, in other respects, in order to challenge the Applicant's credibility. However, the Registrar's concerns were not about the Applicant's disclosure but about his continuing on parole until 1997. The Registrar stated that he telephoned the Applicant after a criminal record search, which was triggered by the Applicant's disclosure on the application, revealed no record in Canada. The Registrar said that Mr. Schlusberg openly admitted the facts of his conviction and parole.

The Registrar took the position that Mr. Schlusberg had served only part of his sentence. He currently operates under terms and conditions, being those imposed by his parole and upon which the Registrar stated he cannot build. The Registrar stated that it is his policy to refuse registration while an Applicant is on parole because successful completion of parole is necessary to establish that an offender has reformed and is rehabilitated. The Registrar added that material circumstances may have changed sufficiently to warrant registration by 1997, when the Applicant completes parole.

More generally, the Registrar asserted that the Applicant is not entitled to registration, which is a privilege, in a field that is regulated to protect the public. He noted that the Applicant has also been refused entry into other fields of endeavour because of his criminal record and its implications for the Applicant's honesty and integrity and ability to comply with the law.

Mr. Schlusberg testified that he now "begs" for an opportunity to work again and to prove that he can conduct business honestly and lawfully; he stated that he is willing to abide by any terms and conditions.

Mr. Kenneth Boone was the Applicant's parole officer and testified to his continuing support of Mr. Schlusberg. Mr. Boone stated that the Applicant was very cooperative and met all terms and conditions of his parole. He further stated that the aim of the Parole Board is to encourage a productive lifestyle for those released.

In response, counsel for the Registrar referred the Tribunal to the case of Anthony Morello, decided by this Tribunal on September 23, 1993. In that case, the Applicant was denied registration under the Real Estate and Business Brokers Act, in part, because he continued on parole after conviction for trafficking in cocaine. The Tribunal upheld the Registrar's proposal to deny registration, stating:

As far as the policy of refusal because the Applicant is on parole is concerned, [the applicant's counsel] contends it is not set out in the Act and it is a fundamental tenet of law that the Registrar cannot operate outside the Act. On this point, counsel is quite correct in that there is nothing in the Act prescribing the policy apparently adopted by the Registrar. But much has been left by the Legislature to the discretion of the Registrar and the decisions of this Tribunal. The Divisional Court in interpreting the legislation in the matter of Richard Brenner, 19 CRAT 58, has upheld the mandate of the Registrar to decide whether or not an Applicant is fit for registration as a result of his past conduct and parole is clearly a reflection of past conduct. The Court went further in pointing out that this Tribunal must find the Registrar's Proposal in error or it should be supported.

There is a long line of decisions of the Tribunal which entirely supports the Registrar in his policy of refusing to grant registration to an Applicant while he is still on parole. For this Tribunal to decide otherwise is tantamount to

ignoring the law as it has been laid down in its many previous decisions.

With respect, in the view of this Tribunal, the Registrar is required to exercise discretion and not apply policy as if it were prescribed by law. Refusal of registration should not be automatic for all applicants, under all circumstances, who continue on parole.

Nevertheless, given the standard of review articulated in the Brenner case, and given the circumstances of this particular Applicant, this Tribunal cannot conclude that the Registrar was in error in finding that the past conduct of this Applicant affords reasonable grounds for the belief that he will not carry on business in accordance with law and with integrity and honesty.

Upon the evidence presented, the nature of the Applicant's offense was serious, which is reflected in a substantial sentence. The Applicant has only recently been released on parole and he is required to continue to abide by the terms and conditions of his parole for a significant period of time until 1997. Despite Mr. Boone's evidence, which weighed in the Applicant's favour, there exist reasonable grounds for the Registrar's belief respecting the Applicant. These grounds are sufficient to support the Registrar's Proposal to refuse registration in this case.

Therefore, by virtue of the authority vested in it under section 7(4) of the Motor Vehicle Dealers Act, this Tribunal upholds the decision of the Registrar in his Proposal to refuse the Applicant's registration under the Act.

JOSHUA SILBER

APPEAL FROM A DECISION OF THE
MOTOR VEHICLE DEALERS COMPENSATION FUND
TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding
SELWYN CHARLES, Member
ROBERT BANNERMAN, Member

APPEARANCES;
JEFFREY KRAMER, representing the Applicant

LARRY A. BANACK, representing the Board of Trustees
of the Motor Vehicle Dealers Compensation Fund

DATE OF
HEARING: 30 June 1994 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from a decision of the Board of Trustees of the Motor Vehicle Dealers Compensation Fund set out in a letter from that body to the Applicant dated March 29, 1994. The relevant facts are the following.

The Applicant is 21 years old. He has completed two years at Concordia University and has been working over the past year for a property management company as a driver, messenger, clerk, collector of rents and generally doing other errands. He said that he intends to go back to Concordia this fall into his third year in Sociology. He said that for some time, he has been very interested in motor cycles and had owned two or three of them prior to the transaction in question here.

A few days prior to January 20, 1994, he saw an advertisement in the Toronto Star advertising used motorcycles for sale. He called the number and was answered "Diamond Enterprises". He spoke with a man there who identified himself as Ken Mulvina. In this discussion, Mr. Mulvina told him that they were getting a used Harley Davidson 1991 Springer Model motorcycle from the United States very shortly, he said it was in excellent condition and he indicated that it could be purchased at a good price. The Applicant had one or two more telephone conversations with Mulvina before Friday, January 21, 1994, at the conclusion of which the Applicant decided to buy the motorcycle and it was agreed that he

would come to Diamond Enterprises' place of business at 1490 Speers Rd. in Oakville to buy this machine. Mr. Silber said that he and Mulvina had discussed the price in a telephone conversation, that he had first offered \$10,500 and Mulvina first asked either \$13,100 or \$12,900 and they agreed on a price of \$11,550 which he understood was made up of \$11,000 which Diamond Enterprises was paying for the machine, \$500 for that company itself and a \$50 charge for delivery of the motorcycle to the purchaser's home.

When Mr. Silber arrived at the Speers Rd. address in Oakville, he saw a large sign "Diamond Enterprises" marking the premises, three or four used motorcycles apparently for sale and a room at the back where a couple of mechanics were working on motorcycles. He said that all of these things gave him some confidence that he was dealing with a legitimate dealer. His three or more previous telephone conversations had all been with Ken Mulvina and the latter also dealt with him at the premises that day. When they had been discussing the transaction on the telephone, Mulvina had told the Applicant that he should bring a \$2,000 deposit when he came, but later in the last conversation before he came, Mulvina told him that if he brought the whole amount of \$11,550, they would get the bike and drop it off at his home later that same day. Accordingly, Mr. Silber said he borrowed \$9,000 from his friend David Bain, by way of a certified cheque payable to himself and he took \$2,250 in cash and went to the Diamond Enterprises premises. He said he was very excited to be getting this motorcycle, which was one he very much liked, at such a good price.

When he arrived at these premises, the motorcycle was not there, but Mulvina confirmed to him that it was coming that day from the United States (he was never told more specifically from where in that rather large country although he did understand it was being brought into Ontario from the border point of Buffalo), that he, Mulvina had seen it and that it was a 1991 Harley Davidson Springer model in good condition with 6,000 km on its odometer. He said he endorsed over the certified cheque for \$9,000 and gave it and the \$2,250 in cash to Mulvina. Tab 7 of Exhibit 5 shows both sides of the cheque and the back shows that it was deposited in an account of Diamond Enterprises with Canada Trust and cleared on January 24, 1994. At that time, Mulvina made out a document which Mr. Silber took as a Bill of Sale for this motorcycle which was peculiar in a number of respects.

It is a printed form with blanks to be filled in. In the first place, the name of the vendor is printed at the top "Diamond Enterprises Inc" although the evidence established that there was no such company. The evidence provided by the Respondent, and accepted by the Applicant in an Agreed Statement of Facts establishes that "Diamond Enterprises" is a registered trade name

of a company 976993 Ontario Inc. which was incorporated in February 1992. Its address on its Certificate of Incorporation is 1300 Shawson Rd., Unit 5 in Mississauga and this is also the address shown on the Certificate of Registration of the business name of "Diamond Enterprises". Kenneth Mulvina is shown as a director and officer of the company (see tab 6 of Exhibit 5). On a computer printout dated May 26 1994, of a registration under the Motor Vehicle Dealers Act found at tab 5 of Exhibit 5, 976993 Ontario Inc. is shown as being registered as a motor vehicle dealer under the Motor Vehicle Dealers Act on May 14, 1992 and is shown as carrying on its business pursuant to the Act at 1490 Speers Rd. in Oakville. The address printed on the Bill of Sale is the Shawson Rd. address in Mississauga and not the Speers Rd. address in Oakville.

More questions arise with regard to the blanks to be filled in. Nothing whatever is filled in at the top by way of any name or other information concerning the purchaser. In a space in the middle someone has printed "Sold to" with no name indicated and "On purchase to be delivered to" with no name indicated. The only description of the vehicle is "91 Harley Springer" with no licence number, no serial number, no model number, no colour and some other spaces for details also not filled in. The distance travelled is shown as "?6,000 km". We are left to speculate whether the question mark means approximately 6,000 or maybe 6,000 or perhaps something else. The price is shown as being \$11,000, a deposit is shown as \$2,000 and a balance "Payable on delivery" is shown as \$9,000. Under that is written "\$50.00 delivery". There is no mention of the \$500.00. This document fits neither the first transaction discussed on the telephone or the last transaction which the Applicant says he made on the 21st of January at Speers Dr. Some of the terms correspond with those ascribed to the first transaction and some to the second. Finally, someone had written on the left side, "I am acting as an agent on sale and no money will be delivered to Diamond Ent. so no tax is involved. No liens pending on bike." At the bottom are two signatures, that of J. Silbert and K. Mulvina.

Diamond Enterprises did not deliver the motorcycle that evening. Mr. Silber called several times and reattended at the premises at Speers Dr. the beginning of the next week. Mulvina had several excuses and explanations and assured him that he would get the motorcycle, but he did not. Mr. Silber went back a third time on the following Thursday and found the sign gone, the premises locked and, to all appearances, Diamond Enterprises gone from the place. He notified the local police who had laid charges of fraud which have not yet come to trial. Upon these facts and allegations, Mr. Silber made a claim upon the fund for \$11,550.

There are a number of issues to be determined. The

Applicant must bring his claim within the provisions of section 12(3) 4. of the Schedule "Terms of Compensation Fund" forming part of Ontario Regulation 801 made under the Motor Vehicle Dealers Act which reads in part:

12(3) A customer may make a claim against the Fund where the customer gives written notice of the claim to the Registrar within two years of the participants' refusal or failure to pay, even if the motor vehicle dealer with respect to whom the claim is being made ceased to be a participant after the refusal or failure to pay, and where the claim meets one of the following requirements:

.....

4. The customer has made payment by way of deposit, down payment or otherwise to a participant with respect to an undelivered motor vehicle and the customer has not received the motor vehicle contracted for or an alternative motor vehicle that is acceptable to the customer and the claim is for a refund of the payment made to the participant where the customer has made a demand for payment from the participant and the participant has refused without legal justification to make the payment or is unable to pay by reason of bankruptcy or insolvency...

In section 1. of the Schedule "participant" is defined as "a registered motor vehicle dealer who participates in the Fund." It is agreed that all registered motor vehicle dealers in Ontario must participate in the Fund during the period of their registration.

It is admitted that, at the material time, 976993 Ontario Inc. was a registered motor vehicle dealer pursuant to the Act and that it was registered as carrying on this business of Diamond Enterprises. The Applicant has, therefore, met the test that whatever payment he made was made to a participant.

Argument at the hearing was directed by counsel for both parties as to whether Diamond Enterprises was acting as a motor vehicle dealer under its registration when it entered into this transaction. To determine this question, we must look at the definition of a motor vehicle dealer found in section 1 of the Act itself:

"motor vehicle dealer" means a person who carries on the business of buying or selling motor vehicles, whether for the person's own account or the account of any other person, or who holds himself, herself or itself carrying on the business of buying or selling motor vehicles.

"Motor vehicle" is defined in the same section as including a motorcycle. Therefore, it does not really matter whether Diamond Enterprises was acting here as a vendor to the Applicant or rather as an agent as is indicated in the handwritten addition to the Bill of Sale. It was acting as a motor vehicle dealer pursuant to the Act in either case and the Applicant meets the requirement of part 4(3) of section 12 of the Schedule on this point.

Counsel for the Respondent argued strongly that the payment of the whole purchase price is not contemplated in the Regulation as being "payment by way of deposit, downpayment or otherwise". The Tribunal is not able to agree with this submission. In our view, the addition of the words "or otherwise" includes anything by a customer to a motor vehicle dealer participant which is paid upon the purchase price of an undelivered motor vehicle.

It was also argued that the making of the deal so that no tax, either G.S.T. or P.S.T. was paid or indicated as payable showed an illegal intent on the part of the parties to evade lawfully payable taxes and, as such constituted an unlawful transaction and, therefore, that no Court or tribunal should give its assistance to either party to enforce a claim based upon such a transaction. The Tribunal does not find this to have been such an unlawful transaction. If Diamond Enterprises was, in fact, acting as an agent (which we find to be the preferable conclusion to be drawn from the evidence on this point), then there was nothing illegal, and no unlawful intention on the Applicant's part. Therefore, while the Applicant acted foolishly in handing over his money in these circumstances, which fact, in hindsight, he stated himself to be the case, nevertheless in these circumstances the Tribunal finds that he has met the requirement of the Ontario Motor Vehicle Dealer's Compensation Fund - he was dealing with a registered Ontario motor vehicle dealer in a transaction within the above noted requirements and is entitled to the benefits provided.

This brings us to the question of the amount which he should recover. The onus is upon him to satisfy the Tribunal on this point. He can clearly do this with regard to the \$9,000. The evidence shows that the certified cheque in this sum endorsed by the Applicant was deposited in the dealer's bank account. However,

the situation is quite different with regard to the remaining \$2,550 claimed. When asked where he got this cash, he said he withdrew it that day from his own bank account. One must wonder why, when he got a certified cheque from his friend for the \$9,000, he did not get another certified cheque on his own account for the \$2,550, not an inconsiderable amount of money to carry in cash. When asked the denominations of the bank notes in which he had the money, he was vague and really, after two or three questions, not very satisfactory in his answers. When asked why he did not get a receipt for the money, he said that he believed the Bill of Sale was a receipt. When it was pointed out that its figures did not cover the right amount and its terms did not fit the transaction at all for that purpose (as it showed \$9,000 still as the balance due and the \$50 still to be paid on delivery), he said he had not looked at it closely enough to see this; therefore, he had not looked at it to see if it provided him with a receipt. He knew that the onus was on him to prove the point when he came here and, if he had in fact withdrawn such a sum in cash from his bank account on that date, it would have been a simple thing to have got a copy of the withdrawal slip from the bank which would have been corroboration of his evidence.

Altogether the Tribunal did not find Mr. Silber to be a convincing witness on this matter. There are too many contradictions in the evidence we have. In his whole manner of dealing with it, he was vague and far from convincing and he did not bring the best evidence in support of his story (namely, a copy of the withdrawal slip, which would have to be there if his evidence were true). While we are inclined to think that he probably paid something in cash as well as the \$9,000, we find he has not proved any specific amount which he had the onus to do and, therefore, the Tribunal cannot award him anything more than the \$9,000 here.

Therefore, pursuant to the provisions of Section 15(3) of the aforementioned Schedule to Ontario Regulation 801, the Tribunal directs the Board of Trustees of the Motor Vehicle Dealer's Compensation Fund to pay to the Applicant the sum of \$9,000 and otherwise to disallow the Applicant's claim.

TOPNOTCH AUTO SALES
(MONITA CHUCK-YIM WONG)

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REVOKE THE REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chair, presiding

APPEARANCES:
ROBERT PIERCE, Registrar under the
Motor Vehicle Dealers Act

NO ONE APPEARING FOR THE APPLICANT

DATE OF
HEARING: 24 March 1994 Toronto

REASONS FOR DECISION AND ORDER

This was an appeal to the Commercial Registration Appeal Tribunal by the Applicant from a Proposal of the Registrar of Motor Vehicle Dealers and Salesmen dated June 30, 1993 to cancel the Applicant's registration as a motor vehicle dealer. In its application for registration dated November 6, 1991, the Applicant indicated its business address to 6521 Russell Road, Carlsbad Springs, Ontario. The Registrar's Proposal was addressed to the Applicant at that address and at a second address 944 Carleton Drive, Ottawa, Ontario.

Exhibit 3 herein is a letter received by the Tribunal from the Applicant dated August 2, 1993 advising the Applicant of a change of new address to 6211 Russell Road, Carlsbad Springs, Ontario. Exhibit 5 establishes that a copy of the Notice of this hearing was sent by Purolator Courier on February 8, 1994 to the Applicant at this address 6211 Russell Road, Carlsbad Springs and the Tribunal is satisfied that proper steps were taken to notify the Applicant of this hearing.

The Applicant did not appear and no one appeared on its behalf and no communication has been received either by the Tribunal office or by the office of the respondent from the Applicant concerning this hearing.

Mr. Robert Pierce, the Registrar, advised the Tribunal that no notice of change of address was ever filed by this Applicant after the initial application and the granting of the registration. He said that on May 10, 1993, an inspector from the

Ministry attended at the address and found there no sign posted as required by the Regulations, no office of the Applicant whatever, no vehicles offered for sale and no evidence whatever that the Applicant was operating from these premises and, in fact, established the contrary that it was not. It is therefore clear that the Registrar has established the facts upon which his Proposal was based.

Accordingly, pursuant to the authority vested in it by Section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar of Motor Vehicle Dealers and Salesmen to carry out his Proposal.

TREVOR SINGH SALES

APPEAL FROM A PROPOSAL OF THE
REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
TO REVOKE THE REGISTRATION

TRIBUNAL: GORDON R. DRYDEN, Vice-Chair, presiding

APPEARANCES:
TREVOR OUDIT SINGH, agent for the Applicant

ROBERT PIERCE, Registrar under the
Motor Vehicle Dealers Act

DATE OF
HEARING: 24 March 1994 Toronto

REASONS FOR DECISION AND ORDER

This was a hearing before the Commercial Registration Appeal Tribunal arising out of a Proposal issued by the Registrar of Motor Vehicle Dealers and Salesmen to revoke the licence of the Applicant on the 5th day of August 1993. The reason given by the Registrar was that the Applicant was not entitled to registration as he was carrying on activities which were in contravention of the Act or the Regulations and/or was in breach of a term or condition of registration. The relevant facts are as follows.

On November 3, 1991, the Applicant applied for registration as a motor vehicle dealer. His registration was granted in February of 1992 so that his two year registration expired in February 1994. As the result of an inspection on June 16, 1993, which found the Applicant in breach of a number of provisions of the Regulations, the Registrar issued this Proposal. A copy was served upon the Applicant sometime between August 5 and August 17, 1993, when the latter filed his notice of appeal herein. As aforementioned, the registration expired in February of this year before the appeal came on for hearing. If the Applicant had applied for his renewal and paid his fee prior to the date of expiration of the registration, the effect of Section 7(8)(b) of the Act would have deemed the registration to have continued until the order of the Tribunal on this hearing.

Section 7(8):

Where, within the time prescribed therefor or, if no time is prescribed, before expiry of the registration, a registrant has applied for renewal of a

registration and paid the prescribed fee, the registration shall be deemed to continue.

-
- (b) where the registrant is served with notice that the Registrar proposes to refuse to grant the renewal, until the time for giving notice requiring a hearing has expired and, where a hearing is required until the Tribunal has made its order.

The evidence was clear that the Applicant had not before that date of expiry, and has not yet, made an application for renewal or paid his fee.

At the hearing, the Registrar did not take the position that the registration had expired but rather asked for an Order that he carry out his Proposal on the basis that he had established the grounds upon which it was based.

The Tribunal is of the view that the result of the application of the statutory provision quoted above to the facts which we have here is that I must find that the registration has already expired and the Tribunal does not have jurisdiction to hear this appeal. The Applicant has been carrying on business without a registration since the date of expiry. The only way in which he can attempt to remedy the situation now is to apply for new registration pursuant to the Act.

BRENDA ALAIN AND STEPHEN SHAW

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JACINTH HERBERT, Vice-Chair, Presiding
JAMES GRAY LESLIE, Vice-Chair as Member

APPEARANCES: STEPHEN SHAW, appearing on their behalf

MARY NEDOVICH, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 21 February 1994 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal by Brenda Alain and Stephen Shaw. The decision letter dated October 4, 1993 denies their claim for damages under the Act based on the opinion of the Ontario New Home Warranty Program (hereinafter referred to as the "Program") that the building in question, at 126 Morris Lane, Nestleton, Ontario, is an addition and not a single family dwelling. The parties have agreed to have the question of whether the structure constitutes an addition or home under the Act decided by this Tribunal before presenting any further evidence which would go to the issue of a major structural defect.

The section of the Act which is important for these purposes is s.13, particularly (1) and (2) which reads as follows:

13.(1) Every vendor of a home warrants to the owner,

(a) that the home

(i) is constructed in a workmanlike manner and is free from defects in material,

(ii) is fit for habitation, and

(iii) is constructed in accordance with the Ontario Building Code;

- (b) that the home is free of major structural defects as defined by the regulations; and
 - (c) such other warranties as are prescribed by the regulations.
- (2) A warranty under subsection (1) does not apply in respect of,
- (g) alterations, deletions or additions made by the owner.

Stephen Shaw's evidence is, that in August of 1988, he contracted with the builder, Neil Risebrough, to have a home erected on his property. At the time there was an original cottage on the property which was used as a house and in fact was used as such, by the Applicants, while the construction by Risebrough was taking place. The Applicant, Shaw, stated that it was their intention to keep the original cottage as a historic feature of the property, and that the new home actually existed on a separate lot.

Mr. Shaw indicated that the property, which Mr. Risebrough constructed, had its own foundation on all sides, its own heat and its own electrical panel. The septic for this property was fed from the cottage property.

Mr. Shaw indicated that he was assured by the builder, Mr. Risebrough, that the new structure would be covered by the Program. The Applicants are now experiencing problems with their home, which they have indicated results in a major structural defect.

The evidence for the Program was presented by Neil Risebrough, Ken Middleton, Bob Rockbrune and Mr. Morley Thurston. Mr. Risebrough's evidence was that he is not a registered builder and never represented himself as such to the Applicants. He indicated that he was contracted to build an addition onto the existing cottage. I note that the contract proposal, which was put into evidence by the Program, is one between the Applicants and Mr. Risebrough for an addition.

Mr. Ken Middleton, a building inspector with the Township of Scugog, also gave evidence that the approval given by the Township was for an addition. He indicated that, had the application by the Applicants been for a new home, it would not have been approved. A copy of the Building Permit, put into evidence by the Program, indicates clearly that the permit, granted by the Township of Scugog, was for a residential addition.

Mr. Robert Rockbrune, a public health inspector with the Regional Municipality of Durham, gave evidence that his department approved the Applicant's proposal for an addition and not a new home. His evidence was that an application for a new home would not have been approved because of the existing location of the surrounding wells. The original application form to the Regional Municipality of Durham Department of Health Services indicates that the application is for an additional structure of two bedrooms and one bath. The application is signed by the Applicant, Alain.

Mr. Morley Thurston from the Program, testified that the Applicants' claim form was received in August of 1993. Upon reviewing their claim and inspecting the property he determined that the Applicants were not covered because their structure constituted an addition and not a home as defined by the act.

This Tribunal is of the view that the preponderance of evidence supports the Program's claim that the Applicant's structure constitutes an addition and not a home. As set out clearly, in section 13(2) of the Act, this type of structure is not covered by the Program. While this Tribunal recognizes that the Applicants may well have believed that they were covered, it is unable to find in the Applicants' favour.

Therefore, by virtue of the authority vested in it under section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Program to disallow the claim.

DAVID ANDREWS AND DONNA ANDREWS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TRIBUNAL: JUDITH A. KILLORAN, Chair, presiding

APPEARANCES:

DAVID AND DONNA ANDREWS,
appearing on their own behalf

JANE BACHYNSKI, counsel, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 23 August 1994

Ottawa

REASONS FOR DECISION AND ORDER

David and Donna Andrews appeal the decision of the Ontario New Home Warranty Program dated August 9, 1991. The decision letter concludes that as the date of possession of their home was August 27, 1986, their claim about a malfunctioning septic system was not made within the first-year warranty period. Further, the letter states that their claim is not compensable because a major structural defect does not exist.

Two main issues are to be determined:

- 1) Is the Applicants' claim covered by the first-year warranty provision in the Act?
- 2) If not, is the claim a "major structural defect"?

Is the Applicants' claim covered by the first-year warranty provision in the Act?

The parties agreed that there was a valid first-year warranty claim in 1987 by the Applicants. As a result, their septic system was replaced and moved to higher ground in August of 1988.

In a letter dated April 9, 1990, Mr. Andrews wrote the Program about the second installation. In his words: "The problem with the septic system is similar to the first, that is the foul scent effluent was running above the ground surface." Mr. Andrews sought repayment of bills totalling \$578.16 for a new pump to remedy the problem. This claim was rejected in a decision letter

dated October 9, 1990 by attributing the pump's failure to damage due to improper maintenance and normal wear and tear.

In a letter dated December 31, 1990, the Applicants notified the Program that effluent was coming above the ground surface over the filter bed. They were asked to inform the Health Unit, arrange for an inspection and forward the results to the Program.

The decision letter of the Program dated October 9, 1990 was not appealed within fifteen days by the Applicants. As well, the complaint about the second installation of the septic system was not made until more than 1 1/2 years after the installation. In the case of Edgar Cowie (1992) 24 CRAT 509, the Tribunal disallowed a claim on the basis that two defects were not warrantable as the Applicants failed to report faulty repair within a year after the completion of the repair. For these reasons, repair or replacement of the septic system does not meet the requirement of section 13(4) of the Act that a warranty under section 13(1) only applies in respect of claims made within one year.

The Tribunal finds that it is reasonable when dealing with the repair of warrantable items that warranty protection extend for only one year following the repair in order to equal the length of time specified by the Act for the original warranty protection. No compelling arguments were advanced to justify the extension of time such that it would represent a longer period of coverage than specified under the original warranty.

Is the claim a "major structural defect"?

In a letter dated July 8, 1991, Mr. Green of the Health Unit reported on his January inspection where despite a thaw and rain on previous days, he saw no sewage effluent on the ground. However, he did note several pot holes over the filter bed in areas where the Applicants had said the effluent ponded. He commented on a letter dated June 14, 1991 from the Applicants which stated that ponding effluent occurred in April of 1991.

Mr. Green speculated that the infiltration of ground water could lead to periodic flooding of the filter bed and that a spring might be located on or near the property. He acknowledged that the problem was similar to the one experienced by the Applicants in 1987/88 and repeated: "...my recommendations to you as it was when we first met in November of 1987 is to contact a professional engineer to view the site" to determine the source of the problem and propose a solution.

Ms. Heather Mayhew testified that she inspected the home on behalf of the Program on August 1, 1991 and sent a decision

letter dated August 9, 1991 stating that effluent was not visible during her inspection although there were several bare spots in the grass on top of the tile bed where the Applicants indicate that the effluent ponds. She stated that no defect in workmanship or materials was evident nor was it confirmed that the system was not functioning properly. As well, she pointed out that the governing authority, the Health Unit, had not confirmed that a defect exists nor did they condemn the system. She stated there was no evidence to support a "major structural defect" claim.

The Applicants sent a letter dated August 25, 1991 to the Program and a reply was sent by the Program on January 29, 1992. The Applicants were offered two options, that is: 1) hire an engineer, pay him directly and if he was successful in proving that this was a "major structural defect" claim, the Program would reimburse the Applicants for the cost of the engineer as well as the cost of the remedial work; or 2) contact the Program and the Health Unit immediately if effluent ponded on the surface. If this was confirmed and the Health Unit condemned the system for reasons other than homeowner maintenance, the Program would hire an engineer to assess the problem as well as compensating the Applicants for the remedial work required.

In argument, the Applicants related how their first septic system had malfunctioned and was moved to higher ground. They insisted that their house is unliveable when the septic system is not functioning properly. According to them, Mr. Horsley's testimony confirmed that water ponds on the surface and Ms. Mayhew observed holes from ponding if not the effluent. The Applicants insisted that they should not have to hire an engineer to determine the source of the problem if the Program and the builder did not provide a properly functioning septic system.

Counsel for the Program argued that the Applicants had not appealed the decision letter dated October 9, 1990 denying compensation for the pump within the allotted fifteen days. As well, relying on sections 13(2)(c) and 13(2)(f), the Program concluded that the pump is not warrantable.

In order to qualify for compensation, the malfunctioning of the septic system must fall within the definition of a "major structural defect" as the first written notice of a problem was not sent until April 1990, 1 1/2 years after the July/August 1988 installation of the system.

Counsel for the Program argued that there was insufficient evidence as to a defect in work or materials. The ponding appeared to be confined to extremely damp periods which had led to speculation as to sub-surface groundwater or a spring being the source of the problem. She pointed out that the Applicants had

not exercised either of the two options offered to them by the Program. Testimony from both Green and Horsley, employees of the Health Unit in question, confirmed that they had not found evidence of any health hazard such that the Applicants must leave their home.

The Tribunal concurs that the problems with the septic system encountered by the Applicants do not constitute a "major structural defect" and do not qualify for compensation or repair. The Tribunal finds that the Applicants have not discharged the burden of proof necessary to persuade the Tribunal of the existence of a "major structural defect".

The Tribunal relies on the reasoning found in previous cases cited by counsel for the Program. Those cases, all of which dealt with the issue of "major structural defect", were: Hyman Shapiro (1985) 14 CRAT 151, Kenneth Earley (1986) 15 CRAT 134, Mr. and Mrs. J. McArthur (1989) 18 CRAT 213, Mr. and Mrs. L. Kogan (1989) 18 CRAT 211, Dr. Sleem Feroze (1990) CRAT 226 and Pasquale P. Ferraro released November 16, 1993. The Kennedy case (1982) 11 CRAT 109 set the standard which has been followed to date, and that is:

A major structural defect in our view and as we have found in the past must inter alia be one which renders a home virtually uninhabitable, uncomfortable beyond reason, unsafe or in a state of imminent collapse.

However, the Tribunal has considerable sympathy for the Applicants' plight and regrets that in this case, as in many cases before the Tribunal, the Applicants do not understand the requirements necessary for their claim to qualify as a "major structural defect". One measure that should be considered by the Program to remedy this situation is to improve communication with Applicants both verbally and in its publications by offering more information about: the requirements to be met by "major structural defect" claims, the required notice periods, and the policy with respect to warranty coverage after repairs.

Accordingly, by virtue of the authority vested in it under section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal upholds the decision of the Ontario New Home Warranty Program to disallow the claim of the Applicants.

CATHERINE ARMSTRONG

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JUDITH KILLORAN, CHAIR, presiding

APPEARANCES:

Catherine Armstrong, the Applicant
Brian Campbell, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 2 June 1994

Ottawa

REASONS FOR DECISION AND ORDER

The Applicant appeals the amended decision of the Ontario New Home Warranty Program found in a letter dated August 27, 1993. This letter relies on section 13(2)(a) of the Act to deny the Applicant's claim based on a major structural defect. Section 13(2)(a) excludes from warranty any defect in materials, design and work supplied by the owner. The claim was denied because the builder constructed the home according to the architectural drawings provided by the Armstrongs and the Program held that the subsequent damage was caused by an improperly designed foundation for the existing soil conditions.

A decision letter dated March 19, 1993 from the Program identifies the following problems with the house:

Two large cracks that measure at least a quarter of an inch in width, one is located on the south side of the foundation. In addition to this there are two large cracks over the doorway into the cold storage. Mortar is also cracked over the front doorway and back door as well. The basement floor is also cracked in several places and the roof line of the house does not seem as straight as it originally did. Some of the doors jam as well.

In that letter, the Program concludes that it is evident that a major structural defect does exist.

Despite the decision letters relied on by the Applicant to prepare her case, counsel for the Program revealed at the hearing that the issue of design was not a significant issue, there was no defect in the plans, but instead, the problems experienced by the Applicant were caused solely by underlying soil conditions. For that reason, the problems did not constitute a "major structural defect".

The sudden change in the Program's position took the Applicant by surprise and left her unprepared to address adequately the new argument. When the Tribunal suggested an adjournment in order to remedy this unfairness, the Applicant did not consent due to the long period of time which had already elapsed and the inconvenience of booking another date. Taken together with the evidence of the Applicant about other actions of the Program, the Tribunal must express its disapproval of the treatment by the Program of this Applicant.

For example, it was the evidence of the Applicant, presented in a forthright and believable manner, that she phoned a representative of the Program on May 30, 1994 to ask for all documents in her file. She was referred to another representative who explained that she had all the information in the file, except for confidential comments. In her words: "He also informed me that the case was cut and dried and that everyone agreed there was a major structural defect and that the arguments would be about the Act itself."

That same day, the Applicant testified that she was telephoned by yet another representative of the Program who made a settlement offer that the Program would patch cracks over the doorways, repoint the bricks and repair the doors. As well, the Program offered to insert control joints for six months to monitor movement with a final review in twelve months. When the Applicant requested an engineer's report and a written proposal for settlement, she was told that would only be worthwhile if she agreed to cancel the hearing.

The Applicant testified that she and her husband had the plans for their home drawn up by an architectural technician, Pasquale Chiarello. The builders in the area who were registered with the Program asked them to supply the plans. Four of these builders then bid on the plans. The plans were approved by the township.

The Certificate of Completion and Possession (Exhibit 6) is dated September 28, 1988 and the Warranty Certificate (Exhibit 7) is dated March 8, 1989. The Warranty Certificate confirms that the Applicant's home has the benefit of the warranties under the Act and reads: "The Vendor warrants to the owner: ...(b) that the

home is free from major structural defects." There is no dispute that this claim falls within the warranty period for a major structural defect.

The Applicant sent a letter dated January 21, 1993 to the Program outlining the problems with the house. A reply was received from the Program on February 11, 1993 and a proof of claim identifying the builder and describing the problems was returned on February 24, 1993.

Mr. Gerry McEwan of the Program investigated the site in March. A letter dated March 19, 1993 from the Program confirmed that there was a major structural defect and further investigation would be conducted by the Program to determine the scope of repairs required. Mr. Kevin Wheaton, a professional engineer from J. Stuart Hall and Associates, conducted a site observation in May.

The Applicant met with representatives of the Program in August to discuss the engineer's report. These representatives explained that there was a major structural defect which would result in the house sinking as much as six inches in the next 15-20 years. They discussed the three schemes for stabilizing the house proposed by Mr. Wheaton (enclosure to Exhibit 5). As well, a Program representative indicated that the Program would only cover \$100,000 less expenses incurred to date. For the first time, the Applicant was told that since the design was not supplied by the builder, the Program might not be responsible for the warranty.

On August 27, 1994, the Applicant received a letter from the Program denying her claim on the basis of section 13(2)(a) of the Act which excludes from warranty any defect in materials, design and work supplied by the owner.

Mr. Kevin Wheaton testified as an expert witness on behalf of the Program. He stated that the house was built according to the specifications in the plans and there were no defects in work or workmanship or materials. The sole cause of the problems was attributable to the soil conditions, according to him.

Mr. Wheaton proposed that the existing cracks in the house be filled with caulking, that control joints be installed, any doors that jammed be adjusted to prevent jamming, test holes be repaired and the problem monitored for one or two years to see if any further cracking occurred. In his view, only then should remedies be considered.

The Applicant called Mr. Terry Nicholas, a geotechnical engineer with Golder Associates. He attributed the settlement to the soil adjusting to the new load to which it was being subjected. He suspected that the majority of settlement had occurred but

stated that it would be best to monitor for the next year or two. Mr. Nicholas reviewed the three proposed remedies and evaluated their relative effectiveness in dealing with the problem.

The Applicant expressed her frustration with the conflicting positions taken by the Program in response to the structural problems. Counsel for the Program emphasized that the Program does not take issue with the problem but disagrees with the Applicant with respect to the source of the problem. He argued that there was no defect in workmanship or materials that could be attributed to the builder. The conditions in the subsoil were not known to the builder and were beyond his reasonable control. In the alternative, he argued that there is no major structural defect as the Applicant continues to live in the house.

Counsel for the Program pointed out that the evidence adduced was speculative as to remedy. Therefore, in his view, if the Tribunal were to find that there is a major structural defect, the suggested repairs should be made and the house monitored for twelve months as a "good and practical solution".

The Tribunal finds that the problems experienced by the Applicant fit within section 13(1)(b) of the Act. Although counsel for the Program argued that underlying soil conditions are solely responsible for the structural problems, section 13(2)(h) specifies that the warranties under section 13(1) do not apply in respect of, "subsidence of the land around the building or along utility lines, other than subsidence beneath the footings of the building". Therefore, subsidence beneath the footings of the building qualifies for the purpose of the warranties found in section 13. The Report on the Geotechnical Investigation of the Applicant's residence prepared by Golder Associates (Exhibit 8) concludes that "the distress experienced by the house is related to excessive total settlement and excessive differential settlement between the exterior footings of the house and the interior footings".

As for the definition of "major structural defect" found in Regulation 892 to the Act, the Tribunal finds that there is a defect in work or materials that has materially and adversely affected the load-bearing function of this residence, including significant damage due to soil movement. Although it is not clear where the source of the defect is, it is an inescapable conclusion that only a defect in work or materials could result in the settlement experienced. In other words, because there are remedies proposed for this problem, there must exist methods which could be employed to build a house on this soil which would not settle in the manner experienced by the Applicant.

Accordingly, by virtue of the authority vested in it by section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program as follows:

- (1) To repair by patching or caulking the cracks over the doorways and any other cracks resulting from this defect;
- (2) Repair doors that don't shut properly, repair any test holes and repoint the bricks to bring the house up to the standards provided in the Act;
- (3) Install control joints for at least one year to monitor movement, with a final review by a professional engineer to occur no later than eighteen months following such installation;
- (4) After the final review, to meet with the Applicant within sixty days to agree upon a remedy to the settlement problems which will bring the house up to the standards provided in the Act;
- (5) If the parties are unable to agree upon a remedy, either party may apply to this Tribunal for a decision as to remedy;
- (6) It is a condition of the foregoing that the Applicant must allow access to the premises at reasonable times to the persons required to comply with the terms of clauses one, two and three of this Order and, if they refuse to do so, the Tribunal directs that the Program shall have no further obligations to the Applicant.

RINO BAGNAROL

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chair, presiding

APPEARANCES:

PAUL R. BOTTOS, representing the applicant

STEPHEN AUSTIN, representing the Ontario New
Home Warranty Program

DATE OF

HEARING: 19 December, 1994

Toronto

REASONS FOR DECISION AND ORDER

At the opening of the hearing Mr. Bottos applied for an adjournment upon the ground that the client was unable to be present this morning. Mr. Austin opposed the application. After hearing argument on behalf of both parties the Tribunal ordered that:

1. The hearing be adjourned to a date to be fixed by the Registrar.

2. The date for this hearing be fixed by the Registrar in the regular way upon the consent of both parties.

3. Once this date is fixed it be peremptory as against the applicant.

RANDY BRYAN BANNERMAN

APPEAL FROM A DECISION OF THE
ONTARIO NEW HOME WARRANTY PROGRAM

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chair, presiding

APPEARANCES:

WILLIAM L. DEWAR, representing the Applicant

BRIAN M. CAMPBELL, representing the Ontario
New Home Warranty Program

DATE OF

HEARING: 18 March 1994

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal by the Applicant from a decision by the Ontario New Home Warranty Program set out in a decision letter dated January 15, 1993 from the Program to the Applicant's solicitors. The Applicant's claim was made pursuant to Section 14(1)(a) of the Ontario New Home Warranties Plan Act for the return of part of a deposit which he claimed as against a vendor of a condominium unit for failure on its part to complete a contract of purchase and sale. The relevant facts are somewhat unusual.

The Applicant has been a registered nursing assistant for 24 years and is working at St. Joseph's Hospital in London, Ontario. In 1988, he became interested in purchasing a condominium unit from a vendor Richmond Square Development Corporation at 695 Richmond Street in London. He was shown an apartment several times by one Cheryl Armstrong, a representative of the vendor and on July 28, 1988, he entered into an Agreement of Purchase and Sale to purchase Unit 1109 in the building for a purchase price of \$91,350.00. The Agreement provided for an initial deposit of \$5,000 with the Offer, and a further deposit of \$17,837.50 by September 23, 1988 and the balance by way of a mortgage and a certified cheque on closing which was stated to be the later of the "occupancy date" thereafter defined and a date designated by the vendor's solicitor at least 15 days after the vendor's solicitor had notified the purchaser of the registration of the condominium and made a request for a specified date for closing. The "occupancy date" was fixed for September 23, 1988.

Attached to the Agreement was a Schedule "A" which contained the following provisions:

5. If, prior to the transfer of title, any default of the Purchaser whatsoever occurs hereunder, including default in payment of any deposit, or additional deposit monies, and continues for a period of seven (7) days after written notification to the Purchaser of such default, the Vendor shall have the right to declare this Agreement terminated without further notice, and in addition all deposit monies paid hereunder shall be forfeited to the Vendor as liquidated damages.
15. In the event the Declaration and Description have not been registered on or before the Occupancy Date, the provisions of Schedule "D" annexed hereto shall apply and the Purchaser shall pay the Occupancy Fee as provided for in the said Schedule "D", which monthly fee shall not be credited toward payment of the Purchase Price. If the within transaction is not completed for any reason whatsoever, and notwithstanding refund or forfeiture of deposits, the Purchaser shall execute and deliver such documents affecting title as are deemed necessary by the Vendor to effect a resale of the Unit to another purchaser.
22. ...This Agreement shall enure to the benefit of, and shall be binding upon, the respective heirs, executors, administrators, successors and assigns of the parties hereto. It is hereby acknowledged and agreed that this is intended to be a personal agreement between the Vendor and Purchaser and the Purchaser covenants and agrees that the Purchaser will not list for sale, advertise for sale, sell or assign his rights under this Agreement or in the Unit without the prior written consent of the Vendor, which consent may be arbitrarily withheld, and which, if given, shall require the Purchaser to pay all of the Vendor's costs in connection therewith, including legal fees and disbursements.

25. Purchaser acknowledges that the Vendor in accepting this Agreement has relied on each and every of the statements, covenants and agreements by the Purchaser with respect to the within transaction and breach of any one or more of such statements, covenants and agreements by the Purchaser shall entitle the Vendor to declare the within transaction at an end (Purchaser hereby consenting to such termination), and to retain the deposit herein without derogation from any other rights which the Vendor may have.

Attached also was a Schedule "D" which provided that, in the event the condominium was not registered by the Occupancy Date of September 23, 1988, the transaction was to be completed on the basis that the purchaser could move in on that date and pay occupation rent as calculated therein to the closing date and the adjustments would finally be made as of the latter date. In fact, the condominium was not registered by September 23, 1988, and Mr. Bannerman paid the further deposit of \$17,837.50 and moved in and commenced to pay the occupation rent. In fact, the condominium was registered on March 1, 1989. By this time, Mr. Bannerman had become interested in purchasing another property in the country outside of London and decided he would like to sell this condominium unit. He retained a real estate agent to do this on April 10, 1989 and the agent planned an open house to try to sell this unit and was put out of the building by the original vendor. Mr. Bannerman went to the vendor's office about this and was shown the provision in the Schedule forbidding him to list the property and immediately cancelled the listing and took it off the market. Mr. Bannerman said in his evidence that he was told in the office at that time that the principal in the vendor company, Mr. Graat, had no intention of closing a transaction with him. Mr. Bannerman, however, instructed his solicitors then to proceed with the closing.

By March 14, 1989, Mr. Bannerman had a mortgage commitment in place with the Bank of Nova Scotia and on March 30, his solicitor wrote to the vendor's solicitor Mr. Douglas Cassino confirming a conversation in which the latter had told him a closing date would be forthcoming and that this purchase would be among the first to be completed. (see tab D of Exhibit 6).

On April 5, Mr. Bannerman's solicitors wrote to both the London Building Inspector and the Companies Branch of the Ministry of Consumer and Commercial Relations for information required for closing and paid the fees necessary to obtain the same and the next

day he sent his letter of requisitions to Mr. Cassino. On April 7, Mr. Cassino wrote to Mr. Bannerman's solicitor enclosing documents preparing for the closing. Up to this point, there was no suggestion that the transaction would not be closed. However, on April 10, as aforementioned, the problem caused by the listing of the unit for resale arose and Mr. Cassino wrote to a new solicitor whom Mr. Bannerman had retained, Mr. Kent Thomas, as follows:

We confirm your advice by telephone on April 7th, 1989 that you have taken this file over from Mr. Reich. We are advised that Mr. Bannerman has listed this unit for sale contrary to Paragraph 22 of Schedule "A" to the Agreement of Purchase and Sale and has actively continued to market the same despite repeated demands by our client to cease.

Our client considers Mr. Bannerman's actions to be a breach of the agreement entitling the vendor to treat the agreement at an end and retain the deposit in accordance with Paragraph 25 of Schedule "A". However, notwithstanding the foregoing, our client is prepared to return the deposit in return for a full and final release from Mr. Bannerman and Mr. Bannerman's immediate vacancy of the unit.

May we please hear from you by return mail.

(see tab K of Exhibit 6)

Mr. Thomas responded with a counter offer that Mr. Bannerman would remain in occupation until the end of April and pay the occupation fee for this and, upon vacating, receive the return of his total deposit of \$22,837.50 plus accrued interest at the rate specified in the Agreement of Purchase and Sale. Mr. Thomas did not get any response to this Proposal, but Mr. Bannerman in fact did move out on May 1 and on May 12, Mr. Thomas wrote to the vendor's solicitor demanding payment of the \$22,837.50 with interest and some adjustments for the occupation rent and some moving costs. Mr. Cassino responded to this by a letter of May 30 in which he said:

We confirm our various telephone conversations wherein you have advised

that your client does not intend to complete the above-noted transaction. Accordingly, we have been instructed to advise you that, in accordance with the provisions of the Agreement of Purchase and Sale, our client has determined that it will forfeit your client's deposit without prejudice to any other rights it may have under the Agreement of Purchase and Sale.

(see tab N of Exhibit 6)

In the result, Mr. Bannerman had his solicitor sue Richmond Square Development Corporation in the Ontario Court (General Division) and after judgment on a motion for a summary judgment and on appeal therefrom to the Divisional Court and an unsuccessful motion for leave to appeal to the Court of Appeal, on June 22, 1992, Mr. Bannerman had a Judgment against that company for \$22,837.50 and some costs. On June 30, 1992, the solicitor for Richmond Square Development Corporation wrote to Mr. Bannerman's solicitor confirming an offer of settlement in the amount of \$13,773.03 inclusive. After considerable further correspondence, Mr. Bannerman's solicitor wrote the Program on December 2, 1992 asking that the Program pay the \$20,000 maximum allowed for a claim such as that being made by Mr. Bannerman against the Program and that the offer of settlement from Richmond Square of \$13,773.03 be accepted and be rebated to the Program. With this letter, he enclosed a completed Proof of Claim. The Program denied the claim and, in the decision letter of January 15, 1993, said:

We are aware that it was the decision of Mr. Bannerman to vacate the premises located at 695 Richmond Street, London, Ontario, after he had in fact accepted "occupancy". Therefore, it is the position of the Warranty Program that all necessary contractual factors had been met and that coverage of deposit funds in this instance ceased to be in effect from the date of occupancy.

(see tab J of Exhibit 5)

In another letter of March 15, 1993, corporate counsel for the Program said to Mr. Dewar:

Basically, it would appear that your client's claim arises not from the failure

of the vendor to "perform the contract" but from the failure of the vendor to honour its agreement whereby Mr. Bannerman agreed to terminate the transaction and vacate the premises in May of 1989.

(see tab L of Exhibit 5)

When Mr. Bannerman obtained his Judgment aforementioned against Richmond Square, there remained outstanding in that action a claim for damages by Richmond Square for occupancy rent and interest. Mr. Dewar was satisfied that this claim could not succeed because Richmond Square had, in fact, resold the unit to another purchaser for \$11,000 more than Mr. Bannerman had contracted to pay. This issue was scheduled to come on for trial on July 30, 1993. In order to avoid this trial, the solicitors for Richmond Square offered Mr. Bannerman \$10,000 to settle the whole action. On July 12, 1993, Mr. Dewar wrote to the Program stating:

Today, the solicitor for Tony Graat offered us \$10,000 cash (down from the \$13,000.00 earlier offered). The tone in which it was offered invited a counter-offer from the plaintiff (my client).

There is absolutely no doubt in my mind that if this goes to trial and we are successful on these two academic issues, not one dime of Bannerman's judgment will ever be collectible against Richmond Square Development Corporation. The only reason this offer is being made is that Tony Graat will probably have to spend \$10,000.00 in legal fees to pay for the trial and several more appeals if he loses.

(see tab N of Exhibit 5)

Mr. Dewar received no response to this letter as he had received none to a previous letter of April 15 in which he had set out at length his views as to the right of the various issues to be determined at that time. On August 17, Mr. Dewar wrote to the Program again:

You have not seen fit to respond to my letters of April 15, 1993 and July 13, 1993; nor have you returned any of my telephone calls (at least 3); nor has my

client been able to reach you directly despite his many calls to your office.

I cannot understand your reluctance to deal with this matter; may I respectfully draw your attention to Rule 14, commentary 5 of the Rules of Professional Conduct.

In view of our complete inability to get you to deal with this matter, my client's instructions are to advise you he is accepting an offer of \$12,500.00 cash from Richmond Square Development Corp. on the basis that you are agreeable that such settlement is without prejudice to his right to claim against HUDAC under the Act and notwithstanding that he will be required to release Richmond Square Development Corp. (and probably Tony Graat) from all claims. He may well also be required to agree not to take proceedings against any other person or firm that might claim contribution from Richmond Square Development Corp. We point to the unsatisfied judgment against Richmond Square Development Corp. and its cash offer to settle as evidence of the validity of Bannerman's claim.

If you have any position to the contrary, please so indicate by 12:00 noon tomorrow, at which time I will be notifying Richmond Square Development Corp.'s solicitor of Mr. Bannerman's acceptance of its offer.

(see tab O of Exhibit 5)

The Program made no response to this letter and the offer of \$12,500.00 was accepted by Mr. Bannerman and an Acknowledgment of Satisfaction of the Judgment which he held against Richmond Square Development Corporation was executed and delivered on August 25.

There was a considerable amount of evidence concerning occupation rent calculated, paid and claimed, but the Tribunal does not find that any of this has an effect upon the rights or obligations of the parties with which we are concerned here.

It remains to be determined what is the proper result to follow from applying the right principles of law to the fact

situation which is outlined above. It comes down to whether the Applicant brings himself within Section 14(1)(a) of the Act and if so, what amount of damages is he entitled to be paid by the Program. The relevant parts of the Section read as follows:

14.(1) Where,

- (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

.....

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

There is no doubt that the Applicant was a person who entered into a contract for the provision of a home. The question is whether he had a cause of action in damages against the vendor for financial loss resulting from the vendor's failure to perform the contract. It was argued on behalf of the Program that it was the purchaser and not the vendor who breached the contract. It is my view that it is not open to this Tribunal here to determine this issue otherwise than in favour of the Applicant. This was the finding and decision of a Court of superior jurisdiction and the Tribunal cannot come to an opposite conclusion.

This leaves to be determined the issue as to whether the giving of the Acknowledgment of Satisfaction extinguished this claim or the balance of the claim. There is no doubt that the Applicant had a duty, as do all claimants for damages, to take all reasonable steps available to mitigate his damages. Upon the evidence, I find that the acceptance of the \$12,500.00 was such a reasonable step. I agree completely with Mr. Dewar's assessment that if they had gone to trial with the issues against Richmond Square in July or August of 1983, not one dime of Bannerman's Judgment would ever have been collected against Richmond Square Development Corporation and that the only reason the offer was made at that time was to avoid was to avoid the time, trouble and expense of Mr. Graat in continuing this litigation with which his solicitors, as well as Mr. Dewar, must have seen the difficulty.

Furthermore, in several letters Mr. Dewar had made it clear, beyond peradventure of doubt, exactly what was at issue in dealing with this offer of settlement and it is a fair inference

from the fact of the failure of the Program to make any response whatsoever, that the Program did this in order to give the Applicant and his solicitor a chance to make a legal mistake - if they accepted the offer, the Program would take the position it has done at this hearing and, perhaps, if they had not accepted the offer the Program would have taken the position that the Applicant failed to mitigate his damages. In fairness to the Program, the reason given on its behalf was that it denied any claim all along, but this hardly seems good enough in view of the fact that it knew that the main issue as to which party breached the contract had already been determined in a higher Court and, in any event, does not explain why no answer at all was made to the requests that it state its position with regard to the acceptance or non-acceptance of the offer of settlement.

Counsel for the Applicant argued in these circumstances that the Program should be estopped from taking the position that the Acknowledgement of Satisfaction puts an end to the claim under Section 14(1)(a) of the Act here. The Tribunal agrees that this should be the result although perhaps the reasoning leading to it should be slightly different. Upon the findings made in the superior Court and here, at the moment before he accepted the settlement the Applicant was entitled to recover \$20,000 upon this claim which he had already submitted to the Program being the limit established by the Regulations for claims over that sum which this one was by \$2,773.03.

The acceptance of the settlement reduced the loss to \$12,273.03. (The Applicant may have been entitled to some interest but he did not make or substantiate any such claim at the hearing). The action of the Applicant in accepting the settlement was, therefore, of substantial benefit to the Program and was done in accordance with a duty which the Applicant owed to the Program to mitigate his damages. It should not, therefore, be open to the Program to complain of action taken by the Applicant in this respect, particularly when it was given more than ample opportunity to object, if it wished to do so, before the action was taken and chose not to do so. The principle upon which the right to complain by the Program of an Applicant compromising a claim against a Third Party in certain cases is that, in doing so, the Applicant compromises or prejudices the right of the Program to recover, by subrogation or otherwise, from the Third Party an amount paid to the Applicant. Here the result was the reverse. There was some evidence led on behalf of the Applicant that nothing could be recovered from Richmond Square and there was no evidence led to the contrary.

The final remaining question is the amount which the Applicant is entitled to recover. I find this sum to be the \$12,273.03 above mentioned. This was the amount of the damage

suffered by the Applicant by way of financial loss resulting from the vendor's failure to perform the contract. The actual deposit lost was \$22,773.03, but the recovery by way of mitigation of \$12,500.00 reduces the claim to \$12,273.03.

Accordingly, by virtue of the authority vested in it under section 16(3) of the Ontario New Home warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to pay to the Applicant the sum of \$12,273.03.

VICTOR BELCOURT

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JUDITH A. KILLORAN, Chair, presiding

APPEARANCES:

VICTOR BELCOURT, appearing on his own behalf

JANE BACHYNSKI, representing the
Ontario New Home Warranty Program

DATE OF
HEARING:

24 August 1994

Ottawa

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program dated June 21, 1993. The decision disallowed the Applicant's claim that the vinyl floors in the kitchen, powder room and foyer are sagging and uneven and fail to meet the standards required by section 13(1)(a) of the Act.

The parties agreed at the outset of the hearing that the only three areas which are the subject of dispute are the kitchen, powder room and foyer as the other floors formerly in dispute were repaired to the satisfaction of the Applicant. The Program claims the floors in question are acceptable and relies on the exclusion in section 13(2)(d) of the Act for normal shrinkage of materials caused by drying after construction.

The Applicant testified that he chose Tartan Homes as his builder because of its good reputation and its advertising claiming a proven track record of value, quality and superb craftsmanship. He submitted in evidence a report from David Ferguson whom he hired pursuant to a contract dated July 14, 1993 to conduct an inspection of his home.

This report stated that the floor joints were uneven and of unequal size making level floors impossible. As well, there were comments throughout about wavy floors and a poor repair of the area around the dishwasher. David Ferguson, who conducted the inspection and wrote the report, did not appear as a witness so that his credentials could be established and his evidence tested.

In cross-examination, the Applicant admitted that the year-end inspection by the builder and the repairs done to those floors which are no longer in dispute were done after the Ferguson Report. The Applicant provided no pictures of the floor areas in question nor measurements of the slope of the floors. In his words, he gave a 1/2 to 3/4" "guesstimation" of the extent of the slope based on measuring with his eyes.

The Program called as its witnesses various representatives of the builder, Mr. Don Collins, a former service manager, Mr. Joe Milroy, a former construction manager, and Mr. John Charron, a service representative. Mr. Collins had his first contact with the Belcourt home during the pre-inspection in August of 1992. A letter from the Applicant was received by the builder in January of 1993 expressing concerns about the floors. As a result, Mr. Collins had ten joists replaced under the kitchen area and testified as to the process whereby the joists were expected to settle.

Mr. Milroy testified concerning his three visits to the Belcourt home. He attended a conciliation meeting in April of 1993 to investigate the uneven floor areas, monitored the subsequent repairs done on May 7, 1993, and participated in an inspection with Paul Rochon, the Program representative, on May 19, 1993. The results of that inspection are contained in the Program decision letter dated June 21, 1993. The decision letter finds the floors in question to be acceptable but not the repair attempt on the floor at the basement stair and in the front bedroom.

Paul Rochon, a Warranty Representative with the Program, testified that at the inspection he was on his hands and knees with a four foot level which determined that industry standards of not more than 1/4" slope over a four foot area were met. He testified that he did not see the nail pops in the floor referred to by the Applicant.

The floors in the Belcourt home were inspected on at least two occasions by the Program; first, by Mr. McEwan and secondly, by Mr. Rochon. Those floors found to be substandard in the McEwan Report were subsequently repaired by the builder. The evidence of Charron, Milroy and Rochon was that the floors in question met both Program and industry standards.

While the Tribunal had sympathy for the Applicant and his dissatisfaction with the floors in dispute, the only evidence in support of his claim was his testimony and the Ferguson report. Little weight can be attached to the report as its author did not appear as a witness and its conclusions were quite vague. No photographs and no measurements were presented by the Applicant to assist the Tribunal in its determination. As a result, there was

insufficient evidence to conclude that the floors were not constructed in a workmanlike manner free from defects in material.

Accordingly, pursuant to the authority vested in it by section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow this claim.

MIKE BIANCANIELLO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding

APPEARANCES:

MIKE BIANCANIELLO, appearing on his own behalf
MARY NEDOVICH, representing the
Ontario New Home Warranty Program
COREY LIBFELD, agent for
Harmony Creek Developments Ltd.

DATE OF

HEARING: 6 June 1994

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from two decisions of the Ontario New Home Warranty Program, one by decision letter dated September 23, 1993 and the second by decision letter dated December 6, 1993. The first of these dealt with a complaint that a number of the glass panes in the windows in the house were scratched on the outside and the second one with a complaint that there was too great a discrepancy in the colour of the ends (called gable ends) and the doors of the cabinets in the kitchen.

The amount in issue between the parties is not very large, but there are some quite nice questions to be determined in reaching the decisions to be made. I must deal with each separately.

Issue of the scratched window panes

The relevant evidence on this issue is as follows. On or about December 12, 1991, Melanie Joseph entered into an Offer of Purchase and Sale with Harmony Creek Investments Corporation to purchase a house which it had built at 1089 Thimbleberry Circle in a new subdivision in Oshawa. The closing date was fixed for January 16, 1992 and the transaction did, in fact, close on that date. The Deed to the land was taken in the names of Melanie Joseph and Michael Biancaniello and it was conceded on behalf of the Program that the Applicant has status to bring this appeal.

While the house had been built previously, the comparatively short time between the signing of the Offer and the

closing resulted in some items not being ready for closing as far in advance as might otherwise have been done and one of these was the cleaning up of the house by the builder before handing it over.

On January 15, 1992, the purchasers met at the house with Todd White, the site supervisor of the vendor/builder to inspect the house and make out the Certificate of Completion and Possession. Mr. White had several interruptions with other matters with the result that, while the purchasers went through the house and noted the items to be listed as deficiencies or damages, the Certificate itself was not completed. The parties met back at the house for this purpose at 8:00 a.m., the next morning January 16 when Mr. White completed the Certificate on the prescribed form from the instructions the purchasers gave him from their notes. Both of the purchasers were clear in their evidence that on the 15th and that at 8:00 a.m. on the 16th, the house had not yet been cleaned up, but when the transaction was closed and they had the keys and came back to the house at 2:00 p.m. on January 16th, the place had been cleaned up.

One of the consequences of the place not being cleaned up, (which included the exterior of the windows which were covered with dirt) was that no one could see the condition of these windows at that time when the parties made their inspection of the house on January 15 or when they were filling out and signing the Certificate of Completion and Possession at 8:00 a.m. on January 16th. Apparently, the weather had been bad just before this time and the purchaser said that this was the explanation given by Mr. White as to why a woman whom the vendor/builder employed to do the cleaning was not able to get it done earlier. While it was better on the morning of January 16th, the weather became worse again later that day and throughout January 17th, being the day the purchasers moved in. It was so bad that the moving truck became stuck and had to be pulled out and one result of this weather was that on the outside, the windows were covered with freezing rain and snow sticking to it, so again it was not until the beginning of the next week that they were cleared off and the purchasers saw the damage to the windows which is in issue here.

While some of the reports refer to "most windows scratched" and there was some evidence given of this, at the conclusion the Applicant was asking only that four window panes be replaced - in the kitchen window one pane, in the family room window two panes and in the living room window one pane. In the kitchen and family room windows, the scratches were described as being more or less 1' long and either vertical or some on an angle. Some of these are visible in photographs in a packet which is Exhibit 12. The scratch on the dining room window is of a different nature being about 6" long and 3-4 mm in width. The Applicant said that a representative of the vendor/builder to whom

he pointed this out told him that it appeared that it was caused by a corner of a brick scraping the window when a bricklayer was moving it into place close to the window.

It was conceded on behalf of the Program that these scratches on these windows were such that they would have been warrantable defects if the purchasers could have established that the builder caused the damage. In the decision letter of September 23, 1993, the claim was denied upon the ground that "The Program finds that the item remains not warranted as there is no direct evidence that the windows were scratched by the builder's staff." In the result, the determination of this issue therefore turns upon whether, upon the evidence presented at the hearing, a finding of fact should be made if the damage was caused by the builder or persons for which it is responsible or not. We have no direct evidence of who did the damage. No witness at the hearing saw it being done or heard any admission by anyone who did it. The Tribunal must, therefore, consider what, if any, inferences should be drawn from the evidence which we have.

We have the direct testimony of both purchasers, that representatives of the builder told them the builder would have the house cleaned before they moved in, that they told them the woman who would do the cleaning was delayed because of bad weather, that the house was not cleaned by 8:00 a.m. on January 16th when they were there, and that the house was cleaned by 2:00 p.m. on the same day when they had a key and returned. It was the evidence of Mr. White that the cleaning to be done consisted of and included cleaning up inside the house, including vacuuming rugs and washing off any dirt to be found and cleaning the outside of the windows. The evidence further established that, when the parties were at the premises on January 15th and at 8:00 a.m. on January 16th, the windows were very dirty and no one could see whether there was mortar stuck on the outside of the glass or just what was there.

When the purchasers returned to the house with a key on the afternoon of January 16th, they saw the house was cleaned but did not look particularly at the windows and could not describe seeing them then. However, early in the next week when the snow and ice melted off, they saw that the dirt had been cleaned off and they saw the scratches.

The Program made some attempt to attack the credibility of the purchasers on this point by referring to the fact that it was only at the time of a four-month inspection after the closing that the Applicant first brought this claim to the attention of the Program. The purchasers answered this argument by saying that they had contacted the builder immediately after moving in with a list of complaints including some of an emergent nature (including a leaking toilet) and they were told that the company would deal with

the latter on the basis of information received over the telephone, but to leave the others which were not emergent until the four-month inspection which is what they did.

The other piece of evidence of some probative value of this issue was the evidence of Melanie Joseph that she saw a woman, whom she believed to be employed by the builder scraping dried mortar off the outside of window panes in other houses in the subdivision with a paint scraper. There was also evidence from Mr. White and Mr. Jack Marcoccio, the customer service manager of the builder that the window panes are in place before the brick veneer walls are built and that some mortar sometimes gets on the outside of the glass and has to be cleaned off. It is best to do this immediately because the mortar gets dried on and is harder to get off and that it is quite abrasive and can scratch the glass.

In dealing with the evidence, the first thing which the Tribunal must do is decide whether or not to accept the evidence of the purchasers as being correct. I have no hesitation in doing this. Both of them gave their evidence in a clear and straightforward manner and were not shaken on cross-examination. Therefore, I find as facts that the windows were cleaned, along with the inside of the house on January 16, 1992 between 8:00 a.m. and 2:00 pm., and that the scratches with which we are concerned were made upon the window panes before the beginning of the week after they moved in. From this, I find an irresistible inference that the house was handed over to the purchasers with the scratches then on these window panes. There is no suggestion or evidence whatever that anyone did anything to these windows between January 16 and the beginning of the next week when the scratches were first observed which could have caused this. The ice and snow covered the windows, but would not make scratches upon them. There is also an irresistible inference that it was a person employed by the builder who came in and cleaned the house and these windows on January 16th. Whoever did it had a key to get in and at that time, only the builder had these keys.

It strains credulity to suggest that any other person would come in and do this work to clean this house. Coupled with the evidence that the person who was probably the one who cleared these windows was seen cleaning mortar off other windows with a paint scraper (which has a high risk of scratching the glass), the probability appears to be that these scratches on the kitchen and family room window were caused by the cleaning process of the windows by the vendor's employee. Likewise, on the evidence here, the probability appears to be that the scrape on the living room window was made by a bricklayer employed by the vendor.

However, in my view, to succeed with this claim the Applicant does not have to go so far as to prove that these

scratches came about in these ways. It is sufficient for him to prove that the scratches were on the windows when the vendor handed over possession of the house to the purchasers and he has proved, on a balance of probabilities that these scratches were there by 2:00 p.m. on January 16th when the purchasers took possession. No evidence whatever was given as to the cost or value of replacing these windows, but it appears that the Tribunal does not need this because the proper order to be made is that the Program be required to replace the windows to bring them up to the standard warranted by section 13(1)(a) of the Ontario New Home Warranties Plan Act.

Issue of the colour of the kitchen cabinets

While there were originally four different complaints of deficiencies in these cabinets, at the conclusion of the hearing the Applicant said that he was only pursuing one of them - "the gable ends and the doors are a different colour. The issue here is whether the difference is sufficiently great to constitute a deficiency or constitute a breach of section 13(1)(a) of the Act. It is conceded by both parties that minor variations in such colouring does not give rise to such a claim but, if the colouring is sufficiently different, it will do so. The question becomes, on which side of the line does this case fall?

The Applicant relied principally upon what is shown in photographs he took filed by him in a packet marked Exhibit 16. These do show three cabinet ends of a rather yellowish woodlike finish and a number of cabinet doors with a somewhat different more reddish tinted finish. On the other hand, we have the evidence of two witnesses with some expertise in these matters, Mr. Allegranza, the Program's representative and Mr. Wahab, an official of Canac Kitchens Limited which manufactures such cabinets, both of whom gave it as their opinion that these cabinets were within accepted tolerance for differences in colour.

There were also produced by the Program two model cabinets, Exhibits 17A and B and photographs of them being Exhibits 18A, B and C and 19A and B respectively. Both of these cabinets had very similar colours on their doors and sides but some of the photographs showed as great or greater divergence in colours as shown in Exhibit 16 - demonstrating that, on this point, much apparent difference shown in photographs may be due to the camera, the film or the lighting and other things resulting in incorrect colour shown in photographs. Also on January 12, 1994, after the builder had done certain remedial work in the house, the Applicant signed an acknowledgement that all repair work was completed to his satisfaction except for five listed items which do not include anything about these cabinets.

The Tribunal finds that the Applicant has not established a warrantable defect with regard to these cabinets. I prefer the

evidence of Messrs. Allegranza and Wahab which was clear and unequivocal that the cabinets are within industry tolerance standards. The opinion of Mr. Wahab was based on his observation of Exhibit 16. Mr. Allegranza had seen the original cabinets in question. Therefore, even if the evidence of the photographs in Exhibit 16 be taken at face value (and some real doubt is cast upon it as aforementioned), it does not bring the claim within section 13(1)(a) of the Act. There was no construction in an unworkmanlike manner, there are no defects in material, the cabinets do not affect the fitness of the home for habitation and there are no breaches of the Ontario Building Code.

Therefore, pursuant to the authority vested in it by Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to:

- 1) replace the window panes in four of the windows being the one pane in the kitchen window, two panes in the family room window and one pane in the living room window;
- 2) otherwise to disallow the claims of the Applicant.

MR. AND MRS. MICHAEL BONNAR

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
GURDIAL SINGH FIJI, Member
EDWARD WEISZ, Member

APPEARANCES:
MICHAEL D. CROSBIE, representing the Applicant
BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

DATE OF 24 November;
HEARING: 10 December 1993 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program set out in a decision letter dated July 23, 1993 from the Program to the solicitors for the Applicants and found at tab 24 of Exhibit 4. The Applicants purchased a new home from Wilfong Homes, a division of G.R. Wilfong & Sons Limited to be built in Wilmot Township in Waterloo County by an Agreement of Purchase and Sale dated April 6, 1989 and which became known as 11 Dundee Avenue in Wilno, Ontario. The transaction was closed and a Warranty Certificate issued showing the date of possession to be August 11, 1989. (see Exhibit #5)

The troubles or defects with which we are concerned at this hearing are in connection with the septic system. The first notice in writing given to the Program concerning this claim was by way of a letter from the solicitors for the Applicants to the Program dated February 5, 1991 and received on February 6, 1991. This is clearly outside the time limited in section 13(4) of the Ontario New Home Warranties Plan Act and therefore, to succeed, the Applicants must bring this claim within the definition of a major structural defect which is found in section 1 of Regulation 892:

(o) "major structural defect", means, for the purposes of clause 13(1)(b) of the Act, any defect in workmanship or materials,

(i) that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or

(ii) that materially and adversely and adversely affects the use of such building for the purpose for which it was intended,

including significant damage due to soil movement, major cracks in basement walls, collapse or serious distortion of joints or roof structure and chemical failure of materials, but excluding flood damage, dampness not arising from failure of a load-bearing portion of the building, damage to drains or services, damage to finishes and damage arising from acts of God, acts of the owners and their tenants, licensees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage.

The trouble with this septic system first manifested itself in November 1989 and became worse in 1990. Water and sewage from the system began coming up into the basement of the house through the basement floor drain. By early 1990 if a bathtub of water was emptied, it would come up into the basement and if a toilet was flushed, it would do the same and leave a residue on the floor. This resulted in such a bad odour in the house that the Applicants sometimes had to leave because of it. This situation continued until they had the whole septic system replaced in May 1993.

The evidence established that for the whole time there were just the two Applicants living in the house and the consumption of water was always well below what should have been the capacity of the system. The allegations put forward on behalf of the Applicants were that the system was put in in such a way that water and sewage effluent would flow back through the pipe rather than out into the weeping bed, that the house was

constructed on a lot upon which surface water drained from a number of adjoining properties causing the area above the weeping bed and the bed itself to become water logged so that nothing more could flow or be filtered away through it and that the system became clogged with silt or earth particles washed into it by the surface water which ponded and soaked down through it.

The Tribunal had the benefit at this hearing of expert testimony called on behalf of both parties. The Applicants retained the services of Robert Vander Doelen, a professional engineer with Dominion Soil Investigation Inc. who made certain investigations and observations resulting in certain recommendations. His principal report is found at tab 15 of Exhibit 4 and beginning at page 6 thereof, are found his conclusions and recommendations:

CONCLUSION

It was found that the existing septic system is saturated to levels above the top of the septic tile runs as well as above the top of the septic tank reconstruction.

The contributing causes leading to the failure of the septic system are given below and are broken into two groups:

1) Major Contributing Factors

- a. Excessive clayey topsoil and lesser permeable cover fill materials cover both the tile bed and mantle portions of the septic system. Generally, cover fill should consist of 300 to 450 mm of T=5 to 10 min/cm sand which in turn is overlain by 150 mm of quality topsoil to support grass growth and to allow evapo-transpiration processes to occur.
- b. The drainage characteristic of the imported materials used to construct the septic system vary substantially between good to poor. The materials encountered have percolation T-times in the range of 5 to 20 min/cm rather than the specified design range of 2 to 8 min/cm. Under current criteria specified by the Regional Health Unit, imported fill used to construct a raised septic bed system must have a percolation T-time in the range of 5 to 10 min/cm.
- c. Poor surface drainage mechanisms both within and along the perimeter area of the subject lot exist and therefore, surface water run-off traverses across the surface of the septic system rather than properly being intercepted and diverted around the septic system. It is this office's opinion that surface water run-off from the two lots located directly uphill (i.e. south) of the subject lot can cascade onto the subject septic system during rainfall and snowmelt periods (Client's pictures verify run-off conditions).

- d. The native clayey silt subgrade upon which the septic system has been constructed has a percolation T-time in excess of 50 min/cm and therefore, a fully raised septic bed system should have been constructed. The differences between partially raised and fully raised septic bed systems are, the thickness of the sand fill required between the invert of the septic tile trenches and the prepared basal subgrade, and the basal contact area of the sewage system envelope. Fully raised beds require thicker sand and a larger basal contact area in comparison to partially raised septic systems.
- e. The existence of a properly constructed mantle is suspect as a well defined layer of suitable sand was encountered in only one test pit location. The prepared basal subgrade within the sewage system does not slope consistently towards the end of the mantle at 2% as per Paragon Engineering's criteria.

2) Minor Contributing Factors

- a. It is possible that additional hydraulic loading may be occurring from the higher lying septic system located on the lot to the south of the subject site. This possible subsurface flow would occur via the native silt found between the two septic systems. Subsurface flow may also occur via the fine to medium sand seam observed by Paragon Engineering Ltd., during their test pit investigation performed February 10, 1989.
- b. It is possible that additional hydraulic loading of the septic tank may be occurring as a result of drainage of the granular base lying beneath the walk-out basement patio area during wet seasons and major weather events.

REMEDIAL MEASURES

Based on the existing conditions of the septic system, it is doubtful that the existing septic system can be revived without major regrading of the tile bed and its surrounding area to take care of the surface run-off and subsurface flow. A major repair may require a septic permit which in the opinion of the Waterloo Health Unit would require a properly designed system in accordance with present standard.

A new septic system will likely be designed as a fully raised system with 150 m of tiles and 800 m² of total sewage envelope. Such a system should be raised above the existing tile bed grade to alleviate the problem of surface run-off and subsurface flow. However, this system will then need a pump chamber to elevate the sewage to the tile bed. Since the site grades will be raised, it may have to be approved by the Township and the Municipal Engineer of the subdivision (Paragon Engineering Ltd.) A "rough" estimate for a new system could be in the order of \$15,000.

In the course of his evidence before the Tribunal, Mr. Vander Doelen referred to the fact that the water usage records filed showed approximately 1,200 litres of water used per day and since the system was designed to accommodate up to 3,000 litres per day, he said that without the excessive cover fill the system might still have worked. When he dug up the system, he found such a back-up of sand or other soil material in the pipes, that it was obvious that it had been operating improperly for some time and was virtually impossible to rectify. He said the system was definitely substandard and the only thing to do was to replace it.

On cross-examination, Mr. Vander Doelen was referred to certain observations made by engineers employed by Paragon Engineering Limited, the firm which had designed the system and one of whose members, Judy Beauchamp was called as a witness. Mr. Vander Doelen admitted that some of his observations and conclusions were at variance with the opinions of this firm, but in view of the conclusions reached hereafter by the Tribunal, it is not necessary to deal with every point where the two engineers differ and determine which view should be accepted.

Judy Beauchamp, above mentioned, is a civil engineer who has been employed by Paragon Engineering Limited as a project engineer from 1989 to the present time. She spent a good deal of time dealing with this problem and gave evidence at the hearing at some length concerning it. It was her evidence that the septic system was properly designed and installed, and failed because rains caused earth to be washed over the weeping bed areas and water to pond over them so that they became saturated with water and clogged with material brought with the water. She said that it was her opinion that it was water from the surface and not from the septic system which caused the saturation.

There was an issue at the hearing about the lack of grass cover over the leeching bed area in 1989 and into 1990 contributing to the problem and as to whose responsibility this was. In this context, the Program relied upon two passages in the Agreement of Purchase and Sale being paragraph 3 in Appendix "A" which reads:

3. The Purchaser acknowledges that the lands are subject to the restrictions set forth in Schedule "A" attached to this Agreement and agrees to be bound by any provisions which are applicable to subsequent owners. The Purchaser specifically acknowledges and agrees to complete the landscaping of the

property within six months of closing as provided for in the restrictions.

and clause (e) of paragraph 3 of those restrictions which reads:

- (e) Final grading of the lot shall take place concurrently with completion of the building. Weeds shall be removed and grass or suitable ground cover, together with foundation plantings in keeping with reasonable landscaping requirements of the Vendor shall be completed within six months from the date of occupancy of the said building.

The Applicant's evidence was that he sowed grass seeds over the whole area, but because of substantial run-off of rainwater from the adjoining lands upon his property, much of it was washed out and away. Some efforts were made to replace the washouts and reseed, but no satisfactory solution was reached until the new system was installed and the whole area sodded. Ms. Beauchamp said that the sodding of the area at the beginning would have helped, but she believed the saturation would have happened eventually unless the run-off of water onto the property was corrected.

Ms. Beauchamp prepared and filed a plan of the subdivision showing the areas of other adjoining lots and of an adjoining church property from which surface water flowed onto the Applicant's lot and ponded, particularly over the weeping or leeching bed. (see Exhibit 11).

This area is reasonably extensive. She described the result as that of creating a bath-tub effect where the critical area of the septic system became filled with water.

Ms. Beauchamp discounted Mr. Vander Doelen's theory that the excessive clayey overlay of the leeching bed prevented the escape of water or what is termed evapo-transpiration of water through the surface of the soil above the bed as being a significant factor. She said that for much of the year this could not work anyway and that the water and effluent is supposed to filter away out of the tiles and down through the areas under them and not evaporate from the soil above. She said that septic systems are not designed to depend upon this method of operation. Indeed, she said it would have been better for all concerned if the

whole area had been covered with asphalt as then water would not have penetrated it. She further said that if a septic system is full enough to lead to a to evapo-transpiration, it has already failed.

There was considerable discussion during her testimony, both in chief and on cross-examination of the degree of permeability of the soil under the bed as installed and whether the tests done, both before and after the saturation of the system showed that a sufficiently deep excavation was made under it to be filled with water permeable crushed stone or coarse sand. It is not necessary to set this out in detail to state the Tribunal's conclusion that the system, as installed, would have functioned properly if it had not been for the flowing upon the Applicant's low lying land of all the run-off from the higher adjoining lands. However, once the system was saturated by this water and the sand and silt brought with it, it was necessary not only to take the necessary steps to change the drainage of the area to take the area somewhere else, but also to replace the ruined system.

In a letter dated October 23, 1990 to the builder Ms. Beauchamp summarized her opinion of this problem and what should be done to alleviate it:

As you are aware, the drainage problem on the Bonnar site is continuing to pose a serious concern. The drainage swales placed around the existing tile bed have either filled with silt, or simply cannot effectively convey the excessive volume of overland drainage.

To date the drainage scheme for this entire area has been discussed with the property owners, along the rear lot line of Lots 11 to 9. The drainage problem on the Bonnar site is compounded by the problems upstream. Due to heavy siltation, and unmaintained swales, the drainage from upstream lots is not being controlled, but is flowing unchecked through the backyards, and often over the existing tile beds. Additionally the church lands backing onto Mr. Bonnar's property are conveying drainage from upstream areas to Mr. Bonnar's site, instead of to the church driveway, as proposed on the drainage plans.

As was discussed with Mr. Ron Loutrit, the church will regrade it's property to divert drainage away from the property, and the swale between the properties will be deepened, to convey additional flow. Upstream land owners have been advised to regrade their swales, in accordance with the original drainage plans.

Although these measures will significantly reduce the amount of drainage reaching the Bonnar site, we propose additional drainage methods be used to reduce the currently high water table. As we discussed on site on October 17, 1990, the water table seems to have risen significantly since the test pits were excavated on-site. As you mentioned, even the excavation 5 feet below the basement floor of the house was dry prior to building the house.

In order to lower the groundwater table, we recommend that a sub-terrain drain be placed upstream of the tile bed. As shown on Figures 1 and 2, this should be placed under the south and west swales around the existing tile bed. The drain cannot be placed to the east since the sewage effluent migrates in this direction. As shown on the attached figure the drain will outlet to the existing 450 mm diameter storm sewer on the easement immediately south of the Bonnar property.

This method of controlling drainage has been discussed with Mr. Bruce Cannon of Wilmot Township. We will notify you by letter as soon as approval is received for this.

This alternative in conjunction with regrading the existing swales should alleviate Mr. Bonnar's current problem. We recommend that the swale at the back of the house, west of the existing tile bed be kept approximately 0.3 m in depth, but that the swales to the south and east be graded as deep as possible, (ie. 0.5 to 1 m in depth). This solution should mitigate both the overland drainage problems, and the high water table.

Should you have any further concerns regarding this, or questions during installation of the drain please contact me.

As a comparison of the evidence of the two engineers, there was a good deal of agreement between them on the question of the extent of the problem being caused by the excessive clayey cover and lack of evapo-transformation. The Tribunal finds that Ms. Beauchamp's view is more probably correct. However, the facts remain that whatever combination of reasons, the system failed; the whole system became saturated and clogged so that it was virtually impossible to repair it and was not remedied until the ruined system was replaced and the drainage corrected so that the damage would not be repeated.

There is no question that the layout of the lot and the placing of the house and of the septic system upon it were all done by and were the responsibility of the vendor/builder. The situation which created the whole problem was in place at least by November 7, 1989 when Paragon Engineering Limited, on behalf of the builder certified to the Township of Wilmot that the grading of certain lots, including lots 10, 11, 12 and 13, being this lot and others from which water flowed into this lot were satisfactorily completed in accordance with the approved lot grading control plan. (see tab 7 of Exhibit 4)

There remains to be considered whether upon these facts the Applicants have brought their claim within the provisions of section 14(1)(c) of the Act. The Tribunal has no hesitation in finding that the provision of a home with a septic system which functioned as this one did constituted defective work that materially and adversely affected the use of the building for the purpose for which it was designed. The evidence is that the odour

was very bad indeed and the wonder is that the Applicants could put up with it as long as they did before getting something effective done about it.

Next we must look at the exceptions set out in the last part of the definition. Flood damage is excluded. This was not flood damage, but rather damage resulting from a not unusual amount of rainfall over a period of time. In the Shorter Oxford Dictionary, a flood is described as "an overflowing or eruption of a great body of water over land, an inundation, a deluge, a profuse and violent outpouring of water, a violent downpour of rain." What we have here in this case does not come within this definition. Damage to drains and services is also excluded. It is the view of the Tribunal that the septic system is not a drain or service within the contemplation of these words. This exception will include drains and services to bring water in or take water or sewage out into sewers. It might be argued that, if the damage which caused the problems had been to the pipe which conducted the water and sewage effluent from the house to the tile bed, this exception would apply, but the damage was to the tile bed itself which clearly does not come within this exception.

The final question to be determined is what amount are the Applicants entitled to recover out of the guarantee fund by way of damage suffered because of this major structural defect. This presents some difficulty. The Applicants' claim is for the amount set out in certain invoices which form Exhibit 7 herein. These are:

Cost of installing the new septic system plus G.S.T. thereon	\$18,849.12
Three invoices from Dominion Soil Investigation Inc. for its work	2,116.03 417.30
investigating the problem and designing a new system	<u>321.00</u> 2,854.33
Two invoices from Greenhorizons for sodding to complete the cover and landscaping over the finished new septic bed	1,897.50 24.84

By reason of the provision in the Agreement of Purchase and Sale set out above, the purchasers were the parties responsible for the completion of the landscaping of the property and they could not recover the cost of this from the vendor and, therefore, they cannot recover it from the Program in this proceeding. The

invoices received from Dominion Soil Investigation Inc. were all for work made necessary by the defective state of the septic system for which the vendor was responsible and they are entitled to recover these. The account for the new septic system presents another problem which must be considered. There is no question that the Applicants had to arrange for a new system to replace the ruined one. It is, however, also clear that the new system which they ordered and obtained was a considerable upgrade from the original one installed. The evidence also established that, if it had not been for the damage by the water and the sand and the silt coming over and into the tile bed originally installed, it would have performed properly and adequately and, therefore, once the drainage problem was corrected a new installation of a system similar to the original one would have been effective and adequate.

We do not have evidence of what it would have cost to re-install such a system, but it is a reasonable inference that the cost of doing so would have been quite similar to the cost of installing the original weeping tile bed by the vendor/builder in the first place and the latter should have proper records to establish this amount. It is to be hoped that when these records are produced, the parties can agree upon this figure. If they cannot, the matter can be brought back to the Tribunal and the hearing will be re-opened simply for the purpose of determining this issue.

Therefore, by virtue of the authority vested in it by section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to pay to the Applicants the sum of \$2,854.33 being the total of the accounts of Dominion Soil Investigation Inc. aforementioned, together with the amount of the cost of installing the original weeping tile bed which had to be replaced and otherwise to disallow the claims of the Applicants.

The above decision was appealed to the Ontario Court (General Division) Divisional Court. The appeal had not been concluded at the time of this publication.

BRUCE BRAGG AND MARY ELLEN BRAGG
AND
DOUGLAS FURDOCK
AND
DOUG JENNISON
AND
WAYNE MALOTT

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding

APPEARANCES:

STEPHEN E. HALLER, counsel, representing
all Applicants

BETH SYMES, counsel, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 18 January 1994

Toronto

REASONS FOR DECISION AND ORDER

Bruce and Mary Ellen Bragg (the Braggs), Douglas Furdock, Doug Jennison and Wayne Malott, collectively referred to as the "Applicants", appeal decisions by the Ontario New Home Warranty Program denying them refund of their deposits.

Counsel for the Applicants affirmed that it was appropriate that these four matters be heard together. Entered into evidence were four Statements of Agreed Facts on behalf of the Applicants.

The legal issue relevant to the claims of all four Applicants is the applicability of section 14(1)(a) and (2) of the Ontario New Home Warranties Plan Act (the "Act"). Specifically, the Program took the position that the Applicants, through continuing to occupy their respective condominium units in the same property, had not suffered a "financial loss" as required under section 14(1)(a) of the Act. Furthermore, the Program asserted that the Applicants, through the occupancy, had "benefited" within the meaning of section 14(2) of the Act and thus, any award should be reduced by the value of this benefit.

For ease of reference, section 14(1)(a) and (2) are set out below:

14.(1) Where,

(a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

(2) In assessing damages, the Corporation shall take into consideration any benefit, compensation or indemnity payable to the person or owner from any source.

The Facts

Of the Applicants, only Mr. Malott and Mr. Jennison testified, to which particular reference will be made.

More generally, a review of the four Statements of Agreed Facts indicates that the Applicants individually purchased four residential condominium units during the summer of 1990 from Beachplace Development Inc. ("Beachplace"), pursuant to four Agreements of Purchase and Sale (the "First Agreements"). The Braggs, Mr. Furlong, Mr. Jennison and Mr. Malott each paid a deposit of \$20,000 towards the purchase of the particular condominium unit.

All of the Applicants took possession during the summer/fall of 1991. All of the Applicants paid occupancy fees pursuant to their First Agreements until the summer of 1992, at which time, the Braggs, Mr. Furdock and Mr. Malott commenced paying their occupancy fees in trust to their solicitors, Lerner & Associates. All monies paid to Lerner & Associates have been returned to these Applicants. Thus, all the Applicants effectively ceased paying occupancy fees from the summer of 1992 until they all entered into second Agreements of Purchase and Sale on July 5, 1993, with Peat Marwick Thorne Inc. as trustee (the "Second Agreements").

On May 28, 1992, the court appointed Peat Marwick Thorne Inc. as trustee under the Construction Lien Act to act as receiver and manager of Beachplace. On January 14, 1993, the court ordered the trustee to complete the condominium project and to enter into agreements of purchase and sale of the condominium units. On June 3, 1993, the court ordered that the First Agreements between Beachplace and the respective Applicants be terminated without prejudice to any claim of any party under these Agreements.

On June 8, 1993, counsel for the Applicants wrote to the Program requesting return of the original deposit of \$20,000 paid by each Applicant to Beachplace under the First Agreements.

On July 5, 1993, all of the Applicants entered into Second Agreements with Peat Marwick and Thorne for the purchase of a condominium unit. From that time forward, the Applicants have paid occupancy fees to the trustee until the closing of the respective Second Agreements.

More specifically, the Braggs agreed to purchase Unit 304 for \$194,900, paid a deposit of \$20,000 to Beachplace, took possession on June 28, 1991, and paid \$26,353.07 in occupancy fees from June 1991 until July 8, 1992. Under the Second Agreement, the Braggs agreed to purchase the same unit from the trustee for \$142,500, paying a new deposit of \$20,000. On September 9, 1993, the Program denied the Braggs' claim for a deposit refund.

Mr. Furdock agreed to purchase Unit 501 for \$250,000, paid a deposit of \$20,000 to Beachplace, took possession on September 25, 1991, and paid \$24,677.26 occupancy fees from October 12, 1991 until June 1, 1992. Under the Second Agreement with the trustee, Mr. and Mrs. Furdock agreed to purchase the same unit for \$205,000, paying a new deposit of \$90,000. On October 13, 1993, the Program denied Mr. Furdock's claim for a deposit refund.

Mr. and Mrs. Jennison agreed to purchase Unit 608, paying a \$20,000 deposit to Beachplace, on July 20, 1990. On June 28, 1991, the Jennisons entered into a mutual release with Beachplace and transferred their purchase to Unit 302, applying the earlier \$20,000 deposit. On November 1, 1991, Mr. Jennison alone entered into an Agreement of Purchase and Sale of Unit 302 for \$250,000 (the "First Agreement"). The Jennisons took possession on October 29, 1991, and paid occupancy fees of \$8870.96 from November 1, 1991 until May 1, 1992. Under the Second Agreement with the trustee, the Jennisons agreed to purchase Unit 302 for \$195,000, paying a new deposit of \$20,000. On September 14, 1993, the Program denied Mr. Jennison's claim for a deposit refund.

Mr. Malott agreed to purchase Unit 408 for \$159,900, paid a deposit of \$20,000 to Beachplace, took possession on August 1, 1991, and paid \$17,829.81 in occupancy fees from August 1991 until July 1, 1992. Under the Second Agreement with the Trustee, Lori Malott, spouse of Mr. Malott, agreed to purchase a different condominium unit, Unit 604, for \$150,000.

On September 13, 1993, the Program disallowed only part of Mr. Malott's claim, awarding him \$10,733.03 plus interest. The Program took the position that because Mr. Malott was vacating Unit 408 on September 1, 1993 to take occupancy of another unit, "this action serves to qualify the Applicant in that there is a demonstrated financial loss" under section 14(1)(a) of the Act. However, the Program deducted \$9266.03 from the \$20,000 deposit claim to account for what it determined to be unpaid occupancy fees.

Mr. Malott, under cross-examination, stated that he originally agreed to purchase Unit 408, a 2-bedroom unit at 1166 square feet, at the rear of the building away from the beach, for \$159,900 plus GST. He agreed that the purchase prices of the condominium units increased the higher the floor and that Unit 604 was closer to the beach. He stated that he believed the original asking price for Unit 604 was about \$205,000 - \$210,000 and acknowledged that the original asking price for the Braggs' unit, Unit 304, was \$194,900. Mr. Malott testified that he subsequently purchased Unit 604, a 2-bedroom unit at 1389 square feet, for \$150,000 including GST.

Mr. Malott further testified that, contrary to the First Agreement with Beachplace, no forced air heating was ever provided, which Mr. Malott would have preferred. Instead a baseboard heating system was provided. Additionally, only one of two high-speed elevators and only one of two garbage chutes per floor were provided.

Some features set out in the First Agreement, such as telephone-intercom security entrance and security-entranced parking, paved parking lot and landscaping, were delayed in coming, according to Mr. Malott. Eventually, these features and others were provided commencing in the summer of 1993, when the Second Agreements were formed.

Mr. Malott also took the position that other features, such as covered parking and a partially salmon-coloured exterior, were never provided, contrary to the Brochure advertising the condominium property. He stated that the change in exterior colour from blue/white/salmon to blue/white only was not pleasing to him.

He further agreed that his First Agreement contained no representation respecting these particular features.

Under cross-examination, Mr. Malott agreed that the condominium development was located on a lot exactly the same size as promised in the First Agreement. He agreed that what was built eventually was a 34-unit property where a 74-unit property had been planned. He further agreed that the two high-speed elevators were promised for the 74-unit and currently, one such elevator services a 34-unit property.

Mr. Malott agreed that he understood that he was required to pay an occupancy fee from the date of possession, being August 1, 1991, until closing. His occupancy fee as at August 1992 for Unit 408 was calculated to be \$1273.78 monthly, which fee would vary according to changes in interest rates. He agreed that he paid no occupancy fees from July 1, 1992, until July 5, 1993.

Mr. Richard Jackson, Senior Vice President with Peat Marwick Thorne Inc., the trustee, testified that, in accordance with its responsibility to take care of the asset, being the condominium property, the trustee consulted professionals, including real estate marketing consultants, and obtained court direction. The consensus, according to Mr. Jackson, was to complete construction of the 34 units in place, which were to be sold at established market price as of the summer of 1993, and not to proceed with the construction of a 74-unit property.

Demand letters were sent regularly to the occupants, who were holding the First Agreements, for payment of the occupancy fees to the trustee commencing the summer of 1992. He testified that upon obtaining the court order on June 3, 1993, terminating all the First Agreements, occupants who were not paying occupancy fees began to do so rather than vacate the units.

The schedule of 1993 Suggested Listing Prices for the condominium units, upon which the trustee relied, was entered into evidence. Unit 604, which Mr. Malott purchased for \$150,000 inclusive of GST, lists for \$150,000 and unit 408 lists for \$135,000. Unit 304, which the Braggs purchased for \$142,500, lists for \$140,000. Unit 501, which Mr. Furdock purchased for \$205,000, lists for the same price. Unit 302, which the Jennisons purchased for \$195,000 inclusive of GST, lists for \$195,000. Mr. Jackson agreed that the trustee was prepared to negotiate the suggested listing prices.

Mr. Jackson testified that he recalled that the original development by Beachplace did include second-storey parking and a

north wing housing the extra condominium units.

The Applicant, Mr. Jennison, testified that he believed that a covered parking lot would be provided by Beachplace. He testified that he viewed blueprints that showed a second-storey parking lot in a roofed structure. He stated that he obtained the contract to haul away the heavy materials after a determination had been made that the covered parking lot was not to be provided. He said that in the absence of covered parking and what he described as adequate landscape protection from the north wind, sand and snow blow into his car in the summer and winter.

Mr. Jennison further testified that he performed work for Beachplace, the value of which was to be applied towards the purchase price of his condominium unit and to reduce his occupancy fees payable.

The Arguments and Findings

Counsel for the Applicants argued that the court order of June 3, 1993, terminated the First Agreements, thus entitling the Applicants to return of their deposits, which they had paid pursuant to these Agreements. He referred to the case of Singer v. Reemark Sterling I Limited, (1992) 24 R.P.R. 125, where the Ontario Court of Justice (General Division) decided at page 136 that "the applicants, in the light of the breach [of the unit purchase agreement], are entitled to treat all agreements as at an end and to get their money back".

Counsel for the Program argued that the transaction must be viewed as a whole to determine if the Applicants have suffered a "financial loss" within the meaning of section 14(1)(a) of the Act. If there is no such loss, for whatever reason, there is no recovery under this section.

In the view of this Tribunal, the Singer case does not help to support the proposition that termination of a contract entitles the Applicants automatically to return of their deposits under the Act. The Applicants must present sufficient evidence to this Tribunal that they have suffered a "financial loss" in order to be entitled to recover compensation.

According to counsel for the Applicants, the financial loss occurred in one of two ways: the Applicants did not get what they bargained for under the First Agreements or alternatively, once the First Agreement was breached and the deposit lost, the Applicants entered into fresh Agreements with the trustee, accompanied by fresh deposits.

Respecting the first proposition, counsel argued that the Applicants paid less because they received less: for example, no covered parking and no north wing. The Applicants have quantified their damages for breach of the First Agreements in the amount of \$20,000, according to counsel.

This Tribunal disagrees. No persuasive evidence was put forward that the Applicants received a substantially different and quantifiably less valuable property as a result of the breach of the First Agreement. While certain Applicants may have expected that covered parking would be provided, that expectation is not apparently supported by the First Agreements. Additionally, certain differences complained of may be too trivial to be quantified, for example, the change in exterior colour of the building.

The second proposition may underlie the Program's earlier decision to award partial compensation to Mr. Malott alone. The Malott purchase under the Second Agreement involves a new purchaser, Lori Malott, who purchased a new condominium unit. Counsel for the Applicants asked why the remaining Applicants should be prejudiced simply because they remained in the same units.

Counsel for the Program made clear before this Tribunal that the Program now viewed its decision to award compensation to Mr. Malott as erroneous. The Program took the position that none of the Applicants were eligible for recovery of their deposits to Beachplace because none of the Applicants had suffered any "financial loss" within the meaning of section 14(1)(a), when the transactions were viewed as a whole.

For example, counsel argued that the Braggs were bound under the First Agreement to purchase Unit 304 for \$194,900 and to pay occupancy fees from possession until closing. When the First Agreement was terminated by the court in June 1993, counsel acknowledged that the Braggs did have a cause of action in damages against the vendor for its failure to perform the contract. This right was specifically preserved in the court judgment terminating the First Agreements. The Braggs were thus entitled to sue for damages, the purpose of which was to place them in the same position as if the contract had not been breached. The Braggs were also under a duty to mitigate the damages which they had suffered, resulting from the contract breach.

According to counsel for the Program, the Braggs did mitigate their losses successfully by entering into the Second Agreement to purchase Unit 304 for 142,500 and to resume paying occupancy fees, after a year's reprieve, until closing. Arguably,

the Braggs ended up \$52,400 to the good as a result of the contract breach. They were able to purchase the same condominium unit for \$142,500 and to live rent free for a year and they were released from their obligation to pay \$194,900 for the same unit and to pay occupancy fees for an additional year.

Counsel for the Applicants argued that they should not be prejudiced because they had entered into these Second Agreements, which stipulated different purchase prices in accordance with the prevailing market. Assuming that \$194,900 was the fair market value of Unit 304 in the summer of 1990, some evidence was presented that about \$142,500 was the fair market value of Unit 304 in the summer of 1992.

This Tribunal finds that the Second Agreements were not simply a successful exercise in mitigation by the Applicants. These Agreements were fresh transactions that in all cases involved a different vendor and a different purchase price. In the Furdock transaction, a second purchaser was added, being Mrs. Furdock, and in the Malott transaction, a different purchaser bought a different condominium unit. The Tribunal agrees that the Program, in denying these deposit claims, has effectively increased the purchase price of the condominium units by \$20,000 each.

Thus, this Tribunal concludes that the Applicants suffered "financial loss" that was the result of the breach of the First Agreements, being the loss of their deposits of \$20,000 to Beachplace, which falls under section 14(1)(a) of the Act.

However, the applicability of section 14(2) must be considered.

Counsel for the Applicants argued that if a "benefit" under section 14(2) should be found to exist in the non-payment of occupancy fees by the Applicants, the amount of \$500 monthly should be used to calculate the value of the benefit. This is the figure used by the Program in calculating the "benefit" of such non-payment for a period from February through to June 1993, in the Program's decision letter to Mr. Malott. Counsel suggested spreading the occupancy fees, which had been paid, over the period of non-payment, to be divided by the sum of \$500 monthly. For example, the \$17,829.81 paid by Mr. Malott in occupancy fees, when spread over the approximate 12-month period of non-payment and divided by \$500 monthly, results in no benefit to Mr. Malott.

On the other hand, counsel for the Program argued that the value of the "benefit" for each Applicant of living rent free for about a year should be calculated with reference to the First

Agreements and the Condominium Act. Thus, what was paid by the Applicants in occupancy fees from possession until the summer of 1992 reflects the true value of this benefit and not the arbitrary sum of \$500 monthly put forward by the Program.

Counsel for the Program relied upon the unpublished decision of Gennings, decided by the Tribunal in October 1992, for the proposition that unpaid occupancy fees are a benefit under section 14(2) of the Act. This benefit in the Gennings case was valued in accordance with the Agreement of Purchase and Sale and was set off against the applicant's deposit claim.

This Tribunal agrees that all of the Applicants received a "benefit" within the meaning of section 14(2) of the Act during the period when no occupancy fees were paid. In plain language, all of the Applicants lived rent free for about a year.

This Tribunal directs that the value of this benefit is to be calculated with reference to the Agreement of Purchase and Sale with Beachplace and the occupancy fees paid under that Agreement from the date of possession, and the Condominium Act, and not the apparently arbitrary figure of \$500 monthly put forward by the Program.

Once the value of this benefit is calculated properly, the amount of the benefit is to be set off against any deposit claims advanced by the Applicants. The proper result may be the disallowance of certain of the Applicants' claims on this basis only.

In conclusion, this Tribunal has found that the Applicants suffered a financial loss within the meaning of section 14(1) to support entitlement to deposit refund, subject to the limits imposed by section 14(2) of the Act and set out above.

The above decision was appealed to the Ontario Court (General Division) Divisional Court. The appeal had not been concluded at the time of this publication.

BEVERLY BUCHANAN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding

APPEARANCES:

BEVERLY BUCHANAN, appearing on her own behalf

STEPHEN AUSTIN, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 8 April 1994

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from a decision of the Ontario New Home Warranty Program set out in a decision letter dated April 5, 1993 to the Applicant's solicitors. There is a single issue to be determined at this hearing which is whether the Program was correct in its conclusion that the Applicant here does not qualify under the Ontario New Home Warranties Plan Act. The relevant facts are not seriously in dispute.

The Applicant was the owner of a house with a postal address of R.R. #2, Stirling, Ontario, north of Belleville in Hastings County. In February of 1992, this house was destroyed by fire. On May 13, 1992, the Applicant entered into a contract with 604842 Ontario Inc., carrying on business under the name of Homestead Construction, to build a new house to replace the burned one.

At the instance of a fire insurer which was paying pursuant to a policy of insurance an inspection had been made by an engineer of the foundation walls and footings and it was found that all of the footings and part of the old foundation walls were still fit to be re-used and these were incorporated in the new house. The new house built was some larger than the old one had been as the west wall was moved about 10' to the west which resulted in 10' of new footing as well at the west end of the north and of the south walls and a whole new footing on the west side and about 16' of new foundation at the west end of the north wall and about 8' of new foundation wall at the west end of the south wall and, of

course, the whole of the west foundation wall for the new house was replaced. The remainder of the footings and the remainder of the foundation walls from the previous house were used again (see Exhibit 12).

Because of the requirement to fit the new house upon the foundation, Ms. Buchanan had to employ an architect to draw the necessary plans for this purpose. Ms. Buchanan told the Tribunal that she obtained the name of Homestead Construction from a list of builders approved by the Program for this purpose. Its principal and controlling officer was its President, Arnold MacLauchlan, who is also a Minister of the First Gospel Church in Belleville. The building contract provided for coverage of the new home by the Ontario New Home Warranties Plan Act and, in fact, Mr. MacLauchlan enrolled it with the Program in the regular way. Ms. Buchanan said that, in her discussion with Mr. MacLauchlan, he never said that there would be any problems with enrolling it or having it covered.

In her testimony, Ms. Buchanan said Mr. MacLauchlan asked for some extra money to put in two re-enforcing walls to support part of the old foundation walls which were used. She said that the old foundation walls which were used were concrete block and the new ones were made of poured concrete. Her principal complaint at the hearing was of water in the basement. She said that they never had any such problem with the old house and have had continual trouble with the new one. Even before the house was finished, there was water coming in at the north west corner of the basement which was an area where the footings and the foundation wall were new and not reused. Later more water has come in at the back which is partly coming from the old wall. She said that they had hired another contractor to excavate around the house where the water was coming in and she said he found areas where the tar paper or parging did not go down to the footings, in some areas up to 3' where it was not covered. Also the contractor found not enough crushed stone around the drainage pipe around the perimeter of the house.

This second contractor, Shelin Pools Ltd., repaired all of the defects which it discovered and gave Ms. Buchanan a bill for its work for \$6,638.95 including G.S.T. which bill she paid (see Exhibit 9). Ms. Buchanan was also complaining about the fact that Mr. MacLauchlan's company had not completed certain plumbing work in an upstairs bathroom and she had to employ another plumber to do this at a cost of \$140.33 (see Exhibit 10). Ms. Buchanan says there is still a problem with water coming through the back wall further east in an area not repaired by the second contractor.

On cross-examination, Ms. Buchanan said she was sure she had discussed the engineer's report which she had obtained, as aforementioned, with Mr. MacLauchlan. She said that while they had

lived in the old house for 10 years, the back wall was stable. She said she assumed that Mr. MacLauchlan used appropriate judgment as to how much of the old walls could be re-used.

The first witness for the Program was Mr. MacLauchlan. He said that he took over this construction company in 1987 and really commenced building houses in 1989. He has built 30-40 houses since that time. Mr. MacLauchlan had first looked at the ruins of the old house before it was torn down to the foundation. He criticised the manner in which it had been built with the back wall right into a rather steep hill. He said that part of that foundation wall had buckled and it appeared to him that this had happened prior to the fire. He also said that part of the east foundation wall was "wowed" in. He said that he had great reservations about the setting of this house so far into the hill, but he rebuilt it as required by putting it on the old foundation.

Also before he could get a Building Permit, the Municipality required him to get an engineer's report as to the state of the old walls to be used. Contrary to what Ms. Buchanan had said, Mr. MacLauchlan said that he had not been made aware of this one which she had obtained or he would not have ordered a second one. He said that they had added the extra 20' or so of new foundation wall at the back in the north section to replace the part of the old one which had buckled.

Mr. MacLauchlan gave some evidence critical of the drainage of water from the hill behind the house, of the landscaping and grade - none of which Ms. Buchanan took issue with and also some detailed evidence of the drainage around the outside of the foundation described as a "Big O" installation to which I shall not refer further here because, in the result, it is not relevant to the decision to be made.

Finally, Mr. MacLauchlan said that, as a result of learning of the possibility of the Program taking the position that the house could not be covered by its warranties, he did not charge Ms. Buchanan the enrollment fee.

The second witness for the Program was Philip Mayhew, its Technical representative who handled this file. Mr. Mayhew agreed that the Applicant's claims were made upon the Program in time and were not barred on that ground. He went to the premises and inspected the walls where the complaints of leaks were made. He said he saw no water in the basement when he was there.

In his submissions to the Tribunal, counsel for the Program said that the issue which must be determined at this time is whether this home was covered by the warranty provided in the Ontario New Home Warranties Plan Act or not. He said that if it

were determined that the Applicant is right and there is coverage, the Program should go back and inspect further and determine properly what should be done or allowed to the Applicant for warrantable defects but, of course, if it is determined that the home is not covered that will be the end of the matter.

Unfortunately for the Applicant, the Tribunal finds it must come to the conclusion that the house did not qualify for the warranty coverage. To succeed the Applicant must bring her claim within Section 14(1)(b) of the Ontario New Home Warranties Plan Act:

- 14.(1) Where,
 (b) an owner has a cause of action against vendor for damages resulting from a breach of warranty;

.....
 the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

The breach of warranty which must found to come within this section a breach of a warranty provided in section 13(1)(a) of the Act which reads:

- 13.(1) Every vendor of a home warrants to the owner,
 (a) that the home
 (i) is constructed in a workmanlike manner and is free from defects in material,
 (ii) is fit for habitation, and
 (iii) is constructed in accordance with the Ontario Building Code;

To be liable under these provisions the vendor must come within the definition of that term found in section 1 of the Act:

"vendor" means a person who sells on his, her or its own behalf a home not previously occupied to an owner and includes a builder who constructs a home under a contract with the owner;

Homestead Construction was not a person which sold on its own behalf a house not previously occupied to the Applicant, but it was a builder who constructed a home under a contract with the owner and, therefore, comes within this part of the definition, if it is a "builder" within the definition of that term in section 1 of the Act. This term is defined as:

"builder" means a person who undertakes the performance of all the work and supply of all the materials necessary to construct a completed home whether for the purpose of sale by the person or under a contract with a vendor or owner;

In constructing the house, Homestead Construction did not perform all of the work and supply all of the materials necessary to construct a completed home. It used part of the old footings and part of the old foundation wall which had been part of the old house which had been destroyed by fire. The question to be determined is whether this was sufficient to take the contract out of the definition and out of the warranty coverage provided by the Act.

Counsel cited some previous decisions of the Tribunal which reached the conclusion which I have indicated above. See the case of John W. Crate - a decision released on June 21, 1991. In this case, the owners engaged a contractor to build them a home, but in making the contract a number of items necessary in the house were struck out, including the plumbing, the electrical system, a good part of the heating system, all of the interior drywall, the interior trim, the kitchen and bathroom accessories, the vinyl floor, the carpeting and all internal finishing as well as other items. The evidence established that all of these items were to be provided or installed by the owners. At the bottom of page 5 of the decision, the Tribunal said:

Sun-Spec Design-Build Corporation is clearly a person within the meaning of the word as used here, but it did not undertake the performance of all of the work or the supply of all of the materials necessary to construct a completed home. In determining this issue, however, it must be taken into account that the practice of the Program, which is supported by common sense, is that the performance of relatively small amounts of work or the supply of relatively small amounts of material by the owner or by some third party will not take the home out of the definition and vitiate the warranty. The question is how extensive can these contributions be before they take the home out of the definition.

The Tribunal was told at the hearing that

the Program has a general rule of thumb to the effect that the undertaking of the builder must include the services - plumbing, heating, electrical, etc. In this case, the undertaking of Sun-Spec did not include these services and in looking at the total picture, the Tribunal must come to the conclusion that the contribution undertaken by the Applicant in this contract, both as to the work to be performed and as to material to be supplied, was so extensive that Sun-Spec was not a builder who undertook all of the work and supplied all of the material to construct a completed home.

This Crate decision follows and establishes the principles set out in the definition sections of the Act quoted above. The fact situation which we have here in this case is more closely to be found in the case of E. Strassler, a decision released on May 28, 1993. In this case, a new dwelling house which contained two or three self-contained one-family dwellings was constructed on an old foundation. On page 7 of the reasons for its decision, the Tribunal puts the question:

2. Did the incorporation of the old foundation walls into the new building have the effect of taking the building out of the definition found in Section 1(a) with the result the claim does not come within Section 13(1) or Section 13(1)(b) as aforementioned?

At page 9 of this decision, the Tribunal dealt with this question:

I should also deal with the issue of the incorporation into the building of the old foundation walls from the previous building on the property. I was not referred to any authorities on this particular point, but during the argument both counsel have made the submission that the warranties provided by the Act either cover the completed home in these circumstances or they do not cover it at all. In other words, it is not a question of the new work being covered and any old work incorporated not being covered (in which case it would have been vital to know if the sewer pipe which broke was

part of the older building or part of the new installation), but rather a question of whether any new building which includes part of an old building is covered (and all covered) or not covered (no part of it having any coverage). In determining this question, I can only have recourse to what appears to be a proper interpretation of the meaning of the words used in Section 1(a) of the Act:

- 1(a) "builder" means a person who undertakes the performance of all the work and supply of all the materials necessary to construct a completed home whether for the purpose of sale by himself or under a contract with a vendor or owner; While one may argue that the Legislature should have extended the coverage to all new buildings incorporating part of old ones on the basis that if a builder is to use part of an old building he must take the responsibility of warranting it sound for the purpose, this is not the question before the Tribunal. The question is not what the Legislature should have said, but rather what it did say? I have come to the conclusion that a plain reading of the words used restricts the definition of a "builder" for the purpose of this Act to one who builds the whole of a new home and does not include one who incorporates in it any significant part of some other building.

In this case, I would add to what the Tribunal said in the Strassler case, that those responsible for the provisions of the legislation and of the regulations might well review the issue here and consider whether, in a new home which incorporates some part of an older building, the result should not be that there is no warranty coverage upon such home at all, but rather that the builder should be required to warrant the work which he does and the part of the home which he built in any event. However, as was said in the Strassler decision, the Tribunal is not determining what the Legislature should have said but rather what it did say.

Accordingly, by virtue of the authority vested in it by Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

DAVID BURSTEIN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTY PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL:

JAMES GRAY LESLIE, Vice-Chair, presiding

APPEARANCES:

MOSHE RONEN, representing the Applicant

STEPHEN AUSTIN, counsel, representing the
Ontario New Home Warranty Program

DATE OF

HEARING:

15 June 1994

Toronto

REASONS FOR DECISION AND ORDER

David Burstein entered into an agreement with Victoria & Lawrence Investments Ltd. on August 24, 1986 to purchase a condominium unit in Toronto municipally known as The Esplanade.

The purchase price of \$130,990.00 was scheduled to be retired by three deposits of \$6,550.00 payable on successive 60 day periods with a final payment on closing of \$13,098.00 subject to adjustments. The balance of the purchase price was intended to be secured by the purchasers assuming a mortgage in the sum of \$98,242.00.

Although the Agreement defined a closing date of April 26, 1988, this was extended to a final date of May 14, 1991, reflected in the Statement of Adjustments of that date, although there had been an interim closing on December 31, 1989 to afford the purchaser possession. Registration of the condominium eventually took place on February 27, 1991 and only after that date was it possible for the parties to close the transaction. Unhappily, the transaction was not closed since the parties could not agree on two matters which continually stood between them. The vendor alleged the purchaser had breached the agreement by renting the condominium unit to a third party in contravention of the Agreement and the purchaser refused to pay the full occupancy fees demanded by the vendor. As a result, two years of negotiations and correspondence between the parties' solicitors ended in the mortgagee issuing a Power of Sale on the building.

It is common ground that the purchaser paid \$38,754.65 to

the vendor during the period he had possession of the unit and that amount constitutes his claim before this Tribunal.

In dispute from the date of the interim closing on November 23, 1989, was the amount charged by the vendor for occupancy fees. On the Statement of Adjustments, a series of eighteen postdated cheques were required commencing on the 1st day of January 1990, each in the sum of \$1,558.41. This figure was comprised of interest on the first mortgage of \$1,149.66 at 13.50%, \$139.84 in estimated municipal taxes and \$268.91 common expenses. When however the statement was received by the purchaser, he replied through his fiancée Mina Battaglino, that he had no intention of paying the mortgage interest and enclosed nine cheques in the sum of \$408.75. It appeared that he considered the mortgage to be what is known as "a phantom mortgage" and he was not legally bound to pay the interest. During the following months, the solicitors for the parties negotiated both by telephone and correspondence to no avail and it appears from the evidence, the vendor refused to cash the purchaser's monthly cheques for \$408.75 although they were not returned.

On September 25, 1991, the solicitor for the purchaser received a notice of Power of Sale issued by Barclay's Bank, the mortgagee, and as a result attempted to negotiate with the bank's solicitors for the purchase of the premises. The documentary evidence reflects the bank's refusal to conclude the transaction on the basis of the original agreement and no closing took place. In the meantime, the purchaser's solicitors directed a claim to the insurers of the condominium for the return of the deposits paid by their client:

October 20, 1991

Peter Smith
Petrela, Winter & Associates
Insurance Brokers
431 Mount Pleasant Road
Toronto, Ontario

Re: Burstein Purchase from York Town-On-The-Park
222 The Esplanade, Unit 11, Level 10

Please be advised that we represent David Burstein in the above noted matter. Please be further advised that we have received notice from the Vendor's Mortgagees of default under their mortgage. Enclosed please find a letter from the mortgagee's solicitors setting out their position. We are informed that

the amount of the deposits are as follows:

August 24, 1986	\$6,550.00
October 8, 1986	3,750.00 (re Parking)
October 23, 1986	6,550.00
February 20, 1987	6,550.00
November 23, 1989	15,553.65

To date, we have not received any return of deposit and accordingly we hereby notify you of this dispute and make this claim pursuant to the provisions of the Condominium Act R.S.O. 1980, and the terms of the above noted Condominium Deposit Guarantee. Kindly notify the undersigned with your reply.

Yours very truly,

RONEN, ZIMMERMAN

Lawrence Zimmerman

The insurers replied on November 7, 1991 as follows:

November 7, 1991

Mr. Lawrence Zimmerman
Ronen, Zimmerman
Barristers & Solicitors
539 King Street West
Suite 100
Toronto, Ontario
M5V 1M1

Re: Victoria & Lawrence - Yorktown-On-The-Park
Burststein Purchase - Unit 1011, 222 The Esplanade

This will acknowledge receipt of your letter of October 22 dealing with the purchase of the captioned unit.

Having been made privy to the circumstances and the repeated defaults by Mr. Burststein, it is the position of Alta Surety Company that the transaction was terminated consistent with notification provided by the legal firm of Coutts,

Crane in their letter of June 21, 1990, a copy of which is attached for immediate reference.

Accordingly, Alta Surety Company reject any demand made under security posted by them in accordance with the original "Agreement of Purchase and Sale".

Yours very truly,

P.D.R. Smith

Encl.

On July 7, 1992, the purchaser then filed a claim in the Ontario Court of Justice (General Division) and obtained a Judgement against Victoria & Lawrence Investments Ltd. by default. It appears the defendant was by then insolvent and the purchaser now comes to this Tribunal under Section 14(1)(a) to be compensated out of the guarantee fund.

One of the issues before me is what effect if any has the default judgement in the Tribunal's determination of the purchaser's claim?

Mr. Austin, on behalf of the Program, has quite properly referred to the case of Joseph Ciardullo decided on motion before the Tribunal 14 CRAT (1985) 108. In that matter, the Tribunal was asked to decide whether or not the issue of res judicata could be entertained as defence to a claim made under the Act when the claimant had already proceeded in the District Court and had obtained a Judgement.

In considering that case, the Tribunal said:

The principal issue arising from the Motion brought before the Tribunal by counsel for the Appellant is the question of res judicata, that is to say, of whether the Judgement of the Honourable Judge Trotter of the District Court of the Judicial District of York is or is not binding on the Warranty Program by operation of that principle of res judicata or whether, in the alternative, it is not binding upon the Warranty Program because the latter was not a party to the proceedings from which the decision resulted and because the only parties that

would be affected by such a judgement would be the parties to the proceedings which resulted in that judgement or otherwise.

The Tribunal found:

The Tribunal holds that by virtue of that Judgement and by operation of the principle of res judicata the Warranty Program must be deemed (as inheritor of the liability of the builder(s) by operation of law) liable to the Appellant in the amount of \$5,000 which was the amount claimed in the Statement of Claim and allowed in the judgement.

The Program appealed the decision and in its judgement the Divisional Court held:

The judgment of the Court was evidenced properly before the tribunal. It is implicit in such judgement that there was a contract and breach thereof. This cannot be challenged before the tribunal.

(CRAT SCO Decisions and Orders Vol.19, p.141)

It is argued by Mr. Austin that the principle of res judicata does not apply in the present matter because the Program was not a party to the action and had no opportunity to defend. I reject that argument. The Program's liability arises by operation of law from the statute immediately upon the vendor's liability being assessed as it was in the judgement. As far as the default judgement is concerned, it is clear law that the defendant is deemed to admit the allegations of the plaintiff where he fails to defend. The Program, therefore, cannot deny what the vendor is deemed to admit.

For those reasons, it is unnecessary for me to review the evidence of Mr. Zimmerman, solicitor for the appellant and Mr. Crane, the solicitor for the Program to make a finding of liability arising from the contract. That determination has been made by the Court which dealt with the judgement:

Court File No. 46087/92

ONTARIO COURT (GENERAL DIVISION)

BETWEEN

DAVID BURSTEIN

Plaintiff

-and-

VICTORIA & LAWRENCE INVESTMENTS LTD.

Defendant

JUDGEMENT

On reading the statement of claim in this action and the proof of service of the statement of claim on the defendant, filed, and the defendant having been noted in default,

1. IT IS ORDERED AND ADJUDGED that the defendant pay to the plaintiff the sum of \$41,409.30 and the sum of \$200.00 for costs of this action.

This judgement bears interest at the rate of 9.0% percent from its date.

Date August 14, 1992 Signed by _____
Local Registrar

Address of Court Office:

605 Rossland Road East
Whitby, Ontario

A second issue before me is the matter of the amount to which the appellant is entitled to be paid out of the guarantee fund. It is agreed between the parties that the Regulation permits the payment of \$20,000, but Mr. Austin argues that the sum is subject to Section 14(1)(2) of the Act which provides:

(2) In assessing damages, the Corporation shall take into consideration any benefit, compensation or indemnity payable to the person or owner from any source.

Did the purchaser receive any benefit from any source during his occupancy of the premises? From December 31, 1989, until the mortgagee took possession, the issue between the vendor and purchaser was the amount of the occupancy fee. The vendor demanded \$1,558.41 monthly, whereas the purchaser continued to pay and would recognize payment of only \$408.75. The disparity lay in the interest on the mortgage being assumed by the purchaser. Although the purchaser's solicitor had advised Mr. Crane, solicitor for the vendor during the negotiations, that his client intended to pay the full amount in cash in closing instead of assuming the mortgage it was never done. The purchaser, therefore, enjoyed the benefit of that interest during his occupancy of the premises. From the evidence, I assess it at \$28,394.17 which amount must be deducted from the appellant's claim of \$38,753.63.

I find, therefore, the appellant is entitled to be paid out of the guarantee fund pursuant to Section 14(1)(a) of the Ontario New Home Warranties Plan Act, the sum of \$10,359.48.

As far as the remaining issues raised by counsel for the appellant is concerned, I hold there is no provision in the Act permitting this Tribunal to award either costs or punitive damages to the appellant. These claims are therefore disallowed.

RICHARD AND CAROL CAMPBELL

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding

APPEARANCES:

RICHARD AND CAROL CAMPBELL,
appearing on their own behalf

RICHARD CARTY, representing the
Ontario New Home Warranty Program

DATE OF
HEARING:

13 September 1993

Toronto

REASONS FOR DECISION AND ORDER

Mr. and Mrs. Richard Campbell took possession of their new home at 33 Gunn Avenue, Cambridge on June 15, 1988.

It was not until October 16, 1991, that the New Home Warranty Program was advised of their complaints involving water coming into the basement through the floor of the cold room.

Campbell wrote to New Home Warranty Program, on October 15, 1991 as follows:

In July/August 1991, during a heavy rain storm we experienced very severe water mud/damage in the basement, through the whole in the cold room floor. The ground has collapsed under the deck in the front of the house.

.....

This has now caused structural damage under our deck in the front of our house, as it has sunken.

The Program took the position that the problem arose from grading which was a requirement of the subdivision agreement with the responsibility lying with the city, the developer and the builder, but in any event not warranted under the act. It did, however, request the dealer to address the problem in the interest of maintaining good relations between himself and the Program.

The builder in a letter to Program on October 25, 1991 (Exhibit 6104) advised:

1. Grading: Grading on this property was set by my surveyors according to the grading plan and was adjusted at Mr. Campbell's request to remove a steep slope at the rear of the property in favour of a gentler horseshoe swale to provide rear to front drainage. What may be causing a problem is the houses to the rear are draining onto the clients property. The City of Cambridge has told me that if my work is in question that they would notify me. The City has never questioned me regarding my work. As a matter of fact, I have been told that I am one of the few builders in this subdivision that try to adhere to the grading plan.

2. Leaks in Basement: The Campbells have experienced foundation leaks which were repaired through my foundation company, Royal Contractors, who sub-contracted to Kortright Water Protection. These repairs proved unsatisfactory therefore Inside/Outside Waterproofers were brought in to correct the leaks. Their work seems to have failed in a few places as well, however, they are more than willing as is my company to rectify that situation. The Campbell's were notified and assured of this.

3. Water Seepage through Cold Room Clean-out: This particular problem is one that I responded to in August of 1991 (well beyond the warranty period). Initially, I viewed water and mud residue the day after a major rain storm. The clients indicated that the mud and water was entering the dwelling through the sanitary cleanout trap in the fruit cellar floor. I contacted the building department at the City of Cambridge and your office and after consultation we assessed that the weeping tile and drywell system had backed up to the point of least resistance. I informed the clients that should the problem occur again to call me so that I can actually see what was happening. I was called late one evening and did go and observe this flooding,

I immediately realized that there had to be a steady water supply feeding this leak and upon inspection and in the presence of the clients discovered a downspout with the diverter and extension removed. This downspout was pumping water towards the foundation where it was trapped by a birmed garden and concrete walkway with no possible means of draining towards the street according to the grading plan. As a result, the water was creating a sink hole along side the fruit cellar wall and draining straight down and underneath the footing and appearing through the trap in the floor.

I assisted the client in controlling the flood by use of a used sump pump until it burned out and then suggested that a permanent sump pump and active pit might have to be considered. In addition, I contacted my landscaper the next day and met with him on sight to discuss possible corrective measures on behalf of the client. My landscaper to my knowledge then quoted to the client what he would charge to repair the hole and provide a deeper swale to prevent the water being directed towards the foundation ever again in the future. The last time I spoke with this client the question was asked: "What is my bottom line regarding this problem?", and I replied that I felt this situation fell outside my responsibilities. I did, however, offer on behalf of the client to contact and supervise those trades necessary to correct the problem as long as it did not involve me financially.

My immediate reaction to this situation is one mostly of disappointment and frustration. Disappointment because I do not want our company name or any of our products involved in a dispute like this and frustration because the client has not acknowledged any of the time I have put in beyond that called for by the Warranty Program, nor the cost of the burned out pump nor my offer to assist them in this situation. I am also frustrated that not once has the client considered that perhaps the person that installed the garden should have considered the drainage integrity of the property. I also note that in the letter

written by the Campbell's, there was mention of structural damage to the deck. I wonder if the structural damage they are referring to is that damage caused by the company that poured their concrete walkway and embedded the wood stairs. Most contractors would realize the setting of the concrete would in fact cause movement to the stairs and would have left the stairway free floating.

The Program as a result advised Campbell that it could assume no responsibility for the problem, but that the builder was willing to provide some limited assistance. It is clear from the date of possession and the date of the first complaint that the appellant's claim is limited only to major structural damage.

Mr. Campbell in his evidence stated that a hole developed in the front porch area where water gathers under the foundation and flows into the floor since April 1991. He said they had done some work themselves, but it had done no good. Campbell had arranged to pave the driveway in September 1988, but now found that it had dropped two inches together with the garage floor. It has, however, he said, not constituted a hazard.

In its decision of May 5, 1993, after an inspection the Program advised the appellant:

As a result of my inspection at your home on April 13, 1993, we have now concluded our review of your claim for a Major Structural Defect with respect to; soil settlement under front porch area, settlement of the garage floor slab and concrete driveway, basement floor cracks (shrinkage cracks) and basement foundation leak, water damage at main entrance stairwell skylight and drywall bulge in main stairwell wall at the second floor line.

It is the decision of the Ontario New Home Warranty Program, in keeping with the definition enclosed, a Major Structural Defect does not exist.

As you may recall the definition for a Major Structural Defect was discussed during my visit and is also described in the pamphlet "What Every New Home Buyer Should Know" which I left with you.

Since your claim does not fall within these parameters we are unfortunately not able to assist with this problem. However, we do recommend that, where necessary, proper maintenance be carried out in order to avoid any new problems that could arise.

In the case of Dr. Louis Fields (1982) CRAT 11 at page 88, the Tribunal dealt with the term major structural defect:

The use of the word "major" in the all-important phrase "major structural defect", which was devised by the Legislature in its wisdom when it framed this Statute, was almost certainly deliberate. Without it we are left with two words only viz. "structural defect" and the warranty would apply to anything qualifying for that bare definition. But it doesn't, because the Legislature has used the word "major". The defect must therefore be "major" to be warranted. In this case that has not been proven, although the onus is very clearly upon a claimant to do so in order to succeed.

In passing the Tribunal notes that the use of the word "major" implies the fact that there exists an antonym to that word or complementary opposite which is the word "minor". That is to say, the concept of a "major structural defect" implies the complementary concept of a "minor structural defect". The Legislature must have had both such kinds of deficiencies in contemplation - one warranted and one not warranted.

The Kennedy case (1982) CRAT 11 page 109 held as follows at page 110:

A major structural defect in our view and as we have found in the past must inter alia be one which renders a home virtually uninhabitable, uncomfortable beyond reason, unsafe or in a state of imminent collapse...

The Kennedy case was followed in the cases of Kenneth Earley (1986) CRAT 15 page 136 and Marilyn and Murray Ferguson (1987) CRAT 16 at page 149.

The only evidence before this Tribunal on behalf of the Applicant is that of Mr. Campbell himself. We acknowledge that there appears to be a problem with water coming into the house at times, but we have no evidence of a major structural defect. The onus is upon the appellant to satisfy the Tribunal his complaint comes within the relevant section of the Act. In our view, he has failed and the appeal must be disallowed.

Therefore, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow this claim.

CARLETON CONDOMINIUM CORPORATION NO. 394

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JUDITH A. KILLORAN, CHAIR, presiding

APPEARANCES:

JAMES DAVIDSON and ARLENE McKECHNIE,
representing the Applicant
BRIAN CAMPBELL, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 3 June 1994

Ottawa

REASONS FOR DECISION AND ORDER

The Applicant appeals a decision of the Ontario New Home Warranty Program set out in a letter dated March 11, 1992. The letter explains that the Applicant made a claim by way of a deficiency list enclosed with a letter dated October 22, 1988. However, the claim was disallowed because the condominium project was not a new building as it was constructed subsequent to the enactment of the legislation on a pre-existing foundation.

Following the decision letter, the Program, in discussions with the Applicant, advanced a second ground for refusing the claim; that is, coverage was not available due to the terms of the agreements of purchase and sale. Although counsel for the Applicant insisted that the Program should confine itself to the first ground as that was specified in the decision letter, counsel was prepared to address the second ground.

The condominium in question was built in two stages. The foundation was built in 1974 or 1975. The developer at the time was Campeau Corporation. The first stage of construction was to the tops of the foundation walls.

Stage two was from 1985-1987 and included the balance of the construction. Few changes were made to the original plans by Mastercraft Development Corporation, the builder. The completed condominium is a 197-unit highrise apartment building consisting of two wings which contain residential units and a parking garage. One wing is 11 storeys and the other wing is 9 storeys.

A technical audit was conducted by Suter/Keller Engineers and a list of deficiencies prepared. This list of deficiencies was delivered to the Program on October 21, 1988 as a first year warranty claim.

Mr. Herbert Otto, a professional architect, was called as an expert witness by the Applicant. He reviewed the 1985 architectural drawings which he said retained the basic design of the 1974 plans.

In argument, counsel for the Applicant insisted that the Program was foreclosed from making argument denying coverage due to the terms of the agreements of purchase and sale; that is, the "investor" nature of the condominium. He relied on Exhibits 12 and 13 to buttress his position.

Exhibit 12 is a letter dated March 19, 1991 from the Program to the then solicitor for the Applicant restating the builder's reasons for saying that the project is not within the purview of the Act. The two reasons were: the project was constructed on existing foundation walls and a ground floor slab structure, both of which were originally constructed in the mid-seventies. Second, the documentation establishes that the project is an "investor" condominium.

The Program requested information from the Applicant's solicitor addressing both grounds.

Exhibit 13 is the solicitor's response dated July 17, 1991 explaining that the project was constructed in part on an existing foundation and almost all units were sold to investors initially, but maintaining that this was not an issue based on cases to date. Counsel pointed out that the investor question was raised as an issue prior to the decision letter and must have been discarded as a ground for refusal as it was not referred to in the decision.

Counsel for the Applicant addressed three possible objections to the claim. He expressed the first as being that the construction took place in phases over a long period of time. He directed the Tribunal to Gahwiler (1991) 22 CRAT 680 (Tab 3 of Appellant's Statement), where the duration of construction was not a concern.

The second objection addressed was that there were two developers. Counsel stated that there was nothing in the Act requiring the vendor to do all of the construction. Although he found no decisions directly on point, he claimed that the requirement that an owner is not entitled to the benefit of the Act if the owner does any of the construction does not apply in this

case. Counsel referred to Re Ontario New Home Warranty Program and Crown Trust Co. 50 O.R. (2d) 588 which found that a mortgagee selling under a power of sale is a "vendor" under the Act even though not a builder.

The third objection addressed was that some of the construction occurred prior to the enactment of the Act. Counsel referred to the transitional provisions dealing with enrolment in Regulation 726 to the Act. In recognition of partial construction of buildings prior to 1977 (proclamation of the Act), sections 13, 14, 15 and 16 deal with enrolment in these situations.

Counsel distinguished between enrolment and coverage and relied on John W. Crate (1991) 22 CRAT 604 where the Tribunal ruled that failure to enrol a home or pay the fee on the part of a builder does not deprive an owner of coverage if otherwise entitled and likewise, the enrolment of a home not qualified does not render the Program liable.

Counsel argued that construction prior to 1977 would only go to the question of enrolment while the availability of the warranties in section 13 is not dependant on enrolment. His position was that a broad and liberal construction of the Act should be given for the benefit of consumers.

Counsel insisted that a plain reading of the Act would lead to the conclusion that coverage is available in this case. He supported his position by referring to the Canadian Commercial Real Estate Manual, 1993, Volume I (Tab 2 of Appellant's Statement) on page 14-102:

Since the definition of "vendor" in the Act refers to the sale of a home not previously occupied, the Act is clearly not applicable to renovations or conversions to condominium of previously occupied residential units. The Program also takes the position that the Act does not apply to the renovation or conversion of an existing structure previously used for non-residential purposes.

The Program further takes the more extreme position that the Act does not apply to a new structure built on the foundations of an old building. There is little or no support in the Act for the Program's latter two positions.

Counsel for the Applicant addressed the second ground for refusal which was that the Act does not apply to residential units purchased to be tenant occupied. He reiterated that it was his

view that the Program was foreclosed from arguing that position as it was not contained in the decision letter. However, he reviewed the two lines of authority relating to this issue.

Counsel relied on Re Ontario New Home Warranty Program and Meadows of White Oaks II Ltd. et al. (1988) 65 O.R. (2d) 362 which ruled that the definition of "owner" in the Act did not require that the owner occupy the home, but that the home be acquired for occupancy. According to this case, the occupancy might be by the owner or by someone renting from him and would apply even if the agreements contained an absolute prohibition against occupation by the purchasers.

Counsel for the Program argued that coverage should be denied. He pointed out that the extent of the construction in 1974 and 1975 was confirmed by Mr. Otto's testimony and by the architectural drawings (Exhibits 7 and 8). According to him, the legislation is not retrospective and can not cover structures constructed prior to its enactment.

Counsel for the Program relied on section 12 of the Act which states:

A builder shall not commence to construct a home until the builder has notified the Corporation of the fact, has provided the Corporation with such particulars as the Corporation requires and has paid the prescribed fee to the Corporation.

Regulation 892, section 8(2) requires that a builder enrol a condominium project not less than thirty days prior to the commencement of construction. These requirements make it impossible to enrol a project constructed prior to the legislation's enactment.

Counsel argued that the definition of builder requires that the performance of all work and the supply of all materials be made by one person. As well, the warranty in section 13 (1) (iii) demands that a home be constructed in accordance with the Ontario Building Code. No vendor could give such a warranty as to compliance with the Ontario Building Code in effect at the time the Act was proclaimed as the foundation was constructed in 1974-75. He emphasized that the Program did not refuse the claim because the project was built in stages, but rather, because the Program refused to apply the legislation retrospectively.

With respect to the transitional rules found in Regulation 726, counsel claimed that they were to apply to condominium projects completed prior to proclamation of the Act on

January 1, 1977. If not registered as of that date, application could be made and the Program could accept or reject it.

Counsel for the Program pointed to the definition of "owner" in the Act: "... a person who first acquires a home from its vendor for occupancy, and the person's successor in title". Then he reviewed the definition of "vendor": "...a person who sells on his, her or its own behalf a home not previously occupied to an owner and includes a builder who constructs a home under a contract with the owner". He questioned whether Mastercraft met the definition of vendor when in his view, the purchasers of the condominium units did not meet the definition of "owner" since they did not acquire the units for occupancy.

Counsel relied on Platinum I Property Ltd. Partnership et al. v. Ontario New Home Warranty Program; Ontario New Home Warranty Program v. Marchant Building Corp. et al. (1991) 1 O.R. (3d) 513 (C.A.) at 519 which states: "The Act in question here is intended to provide protection to the purchasers of new homes. It clearly has no application to a home that has been rented and it would clearly have no application to these buildings, which are to be rented, except for the existence of the right to acquire title."

Counsel reviewed the Agreement of Purchase and Sale for the condominium units in question and concluded that this constituted an investment scheme as tax relief appeared to be an important aspect of the agreement. Schedule C to the Agreement identifies the "soft costs" associated with the identified unit and subtracts them from the anticipated income. Paragraph 16 on page 14 of the Agreement contains an indemnification relieving the Vendor of any consequences related to the Income Tax Act. Paragraph 31 on page 17 states that the unit will be leased for residential purposes.

A somewhat unusual situation occurred in this case. The Registrar for this Tribunal received further submissions from counsel for the Program after the conclusion of the hearing. Those submissions related to the application of the transitional provisions set out in Part V of Regulation 726; that is, sections 13 to 16 inclusive.

The Tribunal decided that in the interests of ensuring a full and fair hearing, it would request that counsel for the Applicant make submissions on the same subject after having an opportunity to review the Program's submissions. The Tribunal then reviewed both sets of written submissions at the same time before making a decision.

Counsel for the Applicant reiterated that coverage is not dependant upon enrolment. Rather, an owner must only make

reference to section 13 and the definitions in section 1 of the Act to determine the availability of warranties. Nevertheless, the transitional provisions in the regulations contemplate the enrolment of homes which were only partially constructed as at December 31, 1976.

In the words of counsel for the Applicant, the transitional provisions contemplate: the enrolment of common elements of unregistered condominium projects, which would include unsold homes; the enrolment of unsold homes in general; the inclusion of partially constructed buildings in the category of unsold homes. He submitted that coverage under the Act is triggered by the sale of the home, and in the case of condominium common elements, by the condominium's registration.

In his opinion, the transitional provisions recognize that coverage under section 13 of the Act is available where a home was fully or partially constructed as of December 31, 1976. However, these provisions do not govern availability of coverage.

Counsel for the Program submitted that the transitional rules do not apply where a foundation to a building was constructed prior to the passage of legislation and then some ten years later, the foundation is used as the basis for the construction of an apartment condominium. In his view, the transitional rules were designed to facilitate registration of condominiums whose declaration and description had been registered during the voluntary program six months prior to the enactment of the legislation.

In addition, the provisions permit the enrolment of projects uncompleted at the time of the passage of legislation.

Counsel argued that neither of the above situations applies in this case. There was nothing registered at the time the Act came into effect and in order for an "unregistered condominium project" to be enrolled pursuant to section 16(1) of the transitional rules, it has to be a project that includes partially or fully constructed condominium units.

In this case, there was only the foundation, with the foundation walls, the footings and party walls, up to and including the first floor. No condominium units had been constructed. Counsel submitted that the transitional rules were not designed to include new construction built on old foundations.

The Tribunal found the arguments presented by both counsel to be thoughtful and well presented. However, the Tribunal was persuaded by the arguments presented by counsel for the Program which were most compelling and persuasive in the circumstances of

this case. The Tribunal finds in favour of the Program on both grounds.

As to the procedural question raised by counsel for the Applicant about the Program being foreclosed from arguing on the "investor" question, the Tribunal respectfully does not agree. It was evident that counsel received notice it would be an issue in argument at the hearing, and indeed, both counsel arrived prepared to make submissions on this question. Therefore, the Applicant was not prejudiced by the fact that the investor issue was not contained in the original decision letter.

The Tribunal finds that the transitional provisions were not designed to apply to a situation where the foundation of a building was constructed prior to the enactment of the Act and then some ten years later, construction was resumed. The warranties in section 13 do not apply in such circumstances nor do they apply where the definition of "owner" under the Act is not met. This case can not be distinguished in any substantive way from Marchant, where the Court of Appeal ruled that investors did not meet the definition of "owner" prescribed by the Act.

Accordingly, by virtue of the authority vested in it under section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal upholds the decision of the Ontario New Home Warranty Program to disallow the claim of the Applicant.

The above decision was appealed to the Ontario Court (General Division) Divisional Court. The appeal had not been concluded at the time of this publication.

CARLETON CONDOMINIUM CORPORATION NO. 495

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JUDITH A. KILLORAN, CHAIR, presiding

APPEARANCES:

BENJAMIN B. WINTER and NICHOLAS P. HESELTINE,
agents for the Applicant
BRIAN CAMPBELL, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 1 June 1994

Ottawa

REASONS FOR DECISION AND ORDER

The Applicant appeals a decision of the Ontario New Home Warranty Program set out in a decision letter dated July 17, 1992. The Applicant's claim is pursuant to the warranties set out in section 13 (1)(c) of the Act, that is, warranties prescribed by the regulations. More specifically, this claim involves warranties against substitutions, now found in section 19 of Regulation 892 of the Act.

Section 19 of Regulation 892 reads:

Every vendor of a new home warrants to the purchaser that, where the vendor makes a substitution with respect to an item that is referred to in the purchase agreement that is not an item that is to be selected by the purchaser, the item will be of equal or better quality than the item referred to in the purchase agreement.

The claim for substitution relates to three items of construction of common elements at 939 River Road, Ottawa, which is the location of Carleton Condominium Corporation No. 495. This condominium is a four storey building with twenty-four dwelling units.

A successful claim under section 19 for breach of the warranty for substitutions requires proof that: 1) the item is referred to in the purchase agreement; and 2) the item supplied is not of equal or better quality than the item referred to in the purchase agreement.

The Program, in its decision letter, set out each item followed by a description of the claim for that substitution. This is reproduced below:

- 1) Exterior windows. The condominium corporation claims that they were to receive vinyl clad window units, and that the vendor did in fact provide wood units where such units are not clad with any vinyl or aluminum material.

Schedule "C" entitled "Builder's Specifications", was attached to and formed part of the agreement of purchase and sale of individual condominium units. The third item on said schedule "C", provides that "windows; double glazed thermopane wood units with screens, clad patio doors with sliding screen".

Given that the builder supplied and installed double glazed thermopane wood units with screens as set out in the schedule to the agreement of purchase and sale, it is the decision of the Program that a claim for substitution with respect to that item is hereby denied. Section 21 of the Regulations, as referred to above, specifically refers to "an item that is referred to in the purchase agreement", the item that was referred to in the purchase agreement was in fact supplied.

- 2) Patio Doors. As with the windows, as set out above, the claim of the condominium corporation is that clad patio doors were not provided, and in fact, the patio doors provided were wood units with no cladding attached thereto.

Given the reference referred to above in Schedule "C", attached to the agreements of purchase and sale, it called specifically for clad patio doors. It is the decision of the Program that this particular claim item is to be allowed in the amount of \$2,470.00.

Documentation submitted with the claim for substitution, by the condominium corporation with respect to this item, estimates that the cost

of clad versus wood windows and doors for the entire corporation represents an incremental cost of \$16,470. Given that the doors represent approximately 15% of the total of such windows and doors, this claim is being allowed in the amount of 15% of \$16,470, being \$2,470.

While it may be argued that clad doors would represent less maintenance costs over time than wood units, it is the decision of the Program that the cost approach is a reasonable and quantifiable way of compensation.

- 3) Underground electric cabling. It is the claim of the condominium corporation that they were entitled to underground cabling, being the main supply cable to the building, as set out in specifications calling for "copper conductors in a PVC conduit". In fact, the building is fed by underground direct buried cable, being two parallel runs of 750mcm aluminum multi-conductor cables. The condominium corporation claims a differential and installed cost of \$5,000.

It is the position of the Program that nowhere in any agreement of purchase and sale is such a specification set out. However, it may be argued that the particular agreements of purchase and sale used on this project were somewhat unique in that they did reference and agree to construct, in accordance with plans and specifications, that apparently had been produced prior to the entering into of the agreements of purchase and sale for units, and according to the evidence, such drawings and specifications were available for reviewing by perspective purchasers at the time of entering into their agreements of purchase and sale.

It is therefore arguable, that in this specific case those plans and specifications were at least referred to in the agreement of purchase and sale for the units purchased.

It is the contention of the condominium corporation that, while the installation received complies with the appropriate electrical codes and was approved for use in this particular project, the direct buried cable represents a potential for increased maintenance costs, at some point in the future, should the cable fail and be in need of replacement. While the Program would agree that in the event of the need for replacement, the direct buried cable may be more expensive to replace than the replacement of a cable within a PVC conduit, there is no evidence provided to the Program to suggest that the life expectancy of the installed installation is any different than that installation as called for in the plans and specifications referred to by the condominium corporation.

Similarly, there is no evidence that the aluminum cable installed is not of equal or better quality than the copper cable apparently called for in the drawings and specifications. Therefore, the claim with respect to the differential cost of aluminum versus copper cable is denied by the Program.

The Warranty Program has received a quotation from an electrical contractor comparing the installed price of the copper cable in a PVC conduit versus the aluminum cable provided, being direct buried. That contractor's estimate sets out a differential labour component of \$114.00 plus \$1,046.00 for the cost of the PVC conduit and fittings, for a total differential cost of \$1,060.00. Therefore, it is the decision of the Program, that the claim for substitution of the electrical supply cable be allowed to the extent of \$1,060.00

The Applicant's position is that the substitutions with respect to the patio doors, windows and electrical cabling constitute a breach of warranty for items mentioned in the purchase agreement. Specifications for those items are set out in the plans and specifications for the project which are incorporated in the purchase agreement.

Mr. Benjamin Winter, acting as agent for the Applicant, referred the Tribunal to page six of a standard Agreement of Purchase and Sale (Exhibit 7, Tab 3). Clause (b) specifies that the Vendor may: "Substitute other material for that provided in the plans and specifications, provided that the substituted material is equal to or better than that indicated in the plans and specifications."

There are three main issues to be determined:

- 1) Are the three items, the patio doors, windows and electrical cabling, referred to in the purchase agreement?
- 2) If they are items included in the purchase agreement for which substitutions have been made, are the substitutions of equal or better quality?
- 3) If the substitutions are found not to be of equal or better quality, how should damages be measured?

Are the Items Referred to In the Purchase Agreement?

The Tribunal finds that the three items in question are referred to in the purchase agreement. It was not persuaded by the Program's argument that, in order to be considered items referred to in the purchase agreement, the items must be listed in Schedule "C" to the agreement. Although Schedule "C" is entitled "Builder's Specifications", the purchase agreement incorporates "plans and specifications".

The site plan (Exhibit 7, Tab 5) specifies that there should be a 3-4" rigid conduit under the slab for the electrical cabling together with 2-4" PVC ducts encased in reinforced concrete 30" below grade. Further, the specifications supplied by the consulting engineers specify at 24(a) "unless otherwise noted all wires shall be copper RW-90. No aluminum wire is to be used." The Electrical Specifications from Crest Engineering Limited state that the materials to be used are: "Type EB2 Plastic underground power cable ducting: to be CSA B196.1-1972"; and "Rigid PVC ducts, type EB2, encased in reinforced concrete, size as indicated." Part 2 of the Specifications specifies that all conductors are to be copper.

It is interesting that in its decision letter, the Program states that although there is no specification in the purchase agreement for underground copper cabling:

...it may be argued that the particular agreements of purchase and sale used on this project were somewhat unique in that they did reference and agree to construct, in accordance with plans and specifications, that apparently had been produced prior to the entering into of the agreements of purchase and sale for units, and according to the evidence, such drawings and specifications were available for reviewing by prospective purchasers at the time of entering into their agreements of purchase and sale.

It is arguable, that in this specific case those plans and specifications were at least referred to in the agreement of purchase and sale for the units purchased.

It is curious, that with such an admission, the Program was not prepared to allow a claim for substitution with respect to the exterior windows.

The architectural drawings (Exhibit 7, Tab 6) specify that all window frames (which include patio doors as evidenced by the drawings) are to be vinyl clad wood frames. As well, the reference in Schedule "C" is to clad patio doors.

It should be noted that the Program, in its decision

letter, admits that Schedule "C" called specifically for clad patio doors and as a consequence, the Program calculates damages based on the difference in cost between wood and clad doors.

Are the Substitutions of Equal or Greater Quality?

The Applicant called two expert witnesses, Mr. Gidon Mida, a consulting engineer, and Mr. Kevin Daly, an architectural coordinator. The Program called Mr. Dan Moreau, who presently acts as a policy coordinator and advisor but previously acted as a technical conciliator with the Program. Prior to his positions with the Program, he worked as a design engineer.

In his testimony, Mr. Moreau emphasized that the functionality of the three substitutions was identical to that of the specified items. He testified that there was no evidence of corrosion or malfunctioning of the underground electrical cable. On cross-examination, he admitted that his qualifications were in civil engineering and then structural engineering rather than electrical work.

Mr. Gidon Mida testified that he was personally familiar with the power supply feed for the building. It was his opinion that copper was a better cable than aluminum which he said corrodes faster and may create overheating at the connection points. This is reflected in the cost as aluminum is significantly less expensive. He stated that the 3-4" rigid conduit specified in the drawings was better than the direct buried cable for maintenance purposes as it would be simpler, faster and hence less expensive to repair.

On cross-examination, Mr. Mida admitted that no corrosion of the aluminum cable had been identified and although aluminum cables do tend to fail, he could not accurately predict if this particular cable would, and if so, when. However, on re-examination, he stressed that routine maintenance of the aluminum cable would be required to avoid corrosion.

Mr. Kevin Daly, an architectural coordinator with the consulting engineering firm of Buchan, Lawton, Parent Ltd., testified that clad windows are better than wood as they require less maintenance. Although both wood and vinyl windows have a life expectancy of thirty years, vinyl windows require negligible maintenance while wood windows require painting and caulking every three years. The same is true for wood doors as contrasted with vinyl doors. On cross-examination, he admitted that wood windows and doors are functionally equal to vinyl windows and doors.

The issue for this Tribunal is how to measure whether the quality of the substituted items is equal to or greater than those specified. The Tribunal finds that functionality is not the only consideration. Surely, the fact that the three substitutions cost less already points to a difference in quality. When other factors are considered, such as maintenance costs, the Tribunal finds that the substituted items are not of equal or greater quality.

MEASURE OF DAMAGES

The Applicant claims a total of \$69,536 in damages for the three substitution items. The claim is broken down in the following manner:

- 1) the amount of damages resulting from the substitution of a direct buried aluminum cable installation for copper cabling in a rigid conduit is calculated as the difference in cost between the specified and substituted items, namely \$5,600;
- 2) the amount of damages resulting from the substitution of wood frames for vinyl-clad frames for the windows is calculated on the basis of the present value of future maintenance expenditures (Exhibit 7, Tab 7), namely \$55,549; and
- 3) the amount of damages resulting from the substitution of wood frames for vinyl-clad frames for the patio doors is calculated on the basis of the present value of future maintenance expenditures (Exhibit 7, Tab 7), namely \$8,487.

Counsel for the Program argued that in the case of the underground cabling, the Act was not designed to compensate for potential repair costs. With respect to the patio doors and exterior windows, he argued in the alternative that if they were found to be substitutions of lesser quality, the Tribunal should find damages to be equivalent to the difference in the original cost of the doors and windows.

One of the fundamental principles of contract law is that if there is a breach of contract, the Applicant is entitled to be put in as good a position as he would have been in had the Applicant received the performance promised. For that reason, the

Tribunal finds that the Applicant has provided the correct method for calculating the measure of damages. Providing the Applicant with the difference in cost between vinyl clad and wood patio doors and exterior windows does not put the Applicant in as good a position as if vinyl clad patio doors and exterior windows had been provided in the first place.

Mr. Winter, the agent for the Applicant, is a Mathematics professor and provided the table calculating the present cost of future maintenance based on maintenance figures supplied by Mr. Daly, who averaged the quotes supplied by three manufacturers.

The damages attributable to the substituted cabling is a somewhat different matter and the Applicant has asked for the difference in cost. This is the more conservative estimate as Mr. Mida in his testimony stated that if repairs are required, the approximate difference in cost of repair could be \$10,000. As this occurrence is speculative at this point, it is appropriate that the measure of damages is restricted to the difference in cost.

Accordingly, by virtue of the authority vested in it by section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to allow the claim of the Applicant in the total amount of \$69,536.

The above decision was appealed to the Ontario Court (General Division) Divisional Court. The appeal had not been concluded at the time of this publication.

FRAN CHODAK

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
SELWYN CHARLES, Member
EDWARD WEISZ, Member

APPEARANCES:

JOEL SHAW, counsel for the Applicant

KELLY WADDINGHAM, counsel for the Respondent
the Ontario New Home Warranty Program

RAHUL SHASTRI, counsel for the Builder and
Third Party 684774 Ontario Ltd. (Evergreen Villa)

DATES OF 29 April, 22, 23 June
HEARING: 19 September 1994

Toronto

REASONS FOR DECISION AND ORDER

The parties herein having settled this matter and filed Minutes of Settlement herein, pursuant to the authority vested in it by section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs that an Order should go herein pursuant to the Minutes of Settlement Filed.

GORDON DARLING

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding
JOHN HURLBURT, Member

APPEARANCES:

GORDON DARLING, appearing on his own behalf

NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 13 October 1993

Toronto

REASONS FOR DECISION AND ORDER

The present case deals with a homeowner, Mr. Darling, who acquired and found defects in his home which he felt were warrantable. He made a claim with respect to them in a letter to the builder, a copy of which was sent to the Ontario New Home Warranty Program on July 19, 1991 (item 1 in Exhibit 7).

He and the builder came to an agreement on certain items to be repaired, but not on others; the New Home Warranty Program was therefore asked to resolve the dispute. Certain conciliations were held; then, at a certain point in time, Mr. Darling reached an agreement with the builder to settle on a full and final basis the outstanding claims against a cash payment to Mr. Darling.

After that Mr. Darling presented a claim against the New Home Warranty Program to indemnify him with respect to certain items which he alleges were not covered in the settlement.

The judgment of the New Home Warranty Program in essence was that in view of the settlement made between Mr. Darling and the builder, the Program itself was freed of any claims with respect to any items that would be subject to warranty under the Ontario New Home Warranties Plan Act.

The only question that we are here to decide at this moment is whether the Full and Final Release signed by Mr. Darling also acted as a Release from any claim he could make against the Program. If the Full and Final Release were found to not include

the Program, then the Tribunal would reconvene to hear evidence on whether the items in contention were warrantable and if so, whether repairs should be ordered or a cash settlement ordered. If the Full and Final Release also released the Program, then, of course, there will be no need to carry on the hearing.

Therefore, in this judgement, we shall restrict ourselves purely to the legal effect of the Full and Final Release with respect to Mr. Darling's claim against the Program.

The testimony, therefore, of Mr. Balshan will be referred to because it did not deal with the Release, but only with the defects in construction.

Mr. Darling stated that he met Mr. Corvinelli on November 20, 1991 and got an expert's report on certain of the problems with the bricks. The report, which is item 5 of Exhibit 7, speaks for itself and it found that the brick veneer was structurally sound, but did not make judgements on the aesthetic values. At this time, it was clear that the builder and Mr. Darling could reach no agreement with respect to the brick veneer or with the tiles which were damaged, but there were nevertheless negotiations to try to settle all the claims.

Mr. Darling stated that \$2,500 was offered by the builder to settle the case in its entirety and this was refused. The settlement amount, through protracted negotiations, increased to \$5,000. This offer was communicated to Darling's wife and then accepted by both Mr. Darling and his wife. As consideration for the \$5,000, they both signed a Full and Final Release, as it was described in its heading; it appears in Exhibit 5, tab 10 and reads:

FULL AND FINAL RELEASE

IN CONSIDERATION of the payment to us of
 FIVE THOUSAND ----- DOLLARS (\$5,000.00)
 we hereby release and forever discharge CORVINELLI CONSTRUCTION
 LIMITED from any and all actions, causes of actions, claims and demands,
 for damages or loss, howsoever arising, which heretofore may have been
 or may hereafter be sustained by us in consequence of our purchase of 49
 Inglewood Place, in the Town of Whitby, in the Regional Municipality of
 Durham, in the Province of Ontario, being Lot 35, Plan 40M-1581, including
 all damage or loss not now known or anticipated but which may arise in
 the future and all effects and consequences thereof and without limiting the
 generality of the foregoing, any claim or damage related to materials and/or
 workmanship.

AND FOR THE SAID CONSIDERATION we further agree not to make
 any claim or take any proceedings against any other person or corporation
 who might claim contribution or indemnity under the provisions of the
 Negligence Act and the Amendments thereto from the person, persons or
 corporation discharged by this release.

IT IS UNDERSTOOD AND AGREED that the said payment is deemed to
 be no admission whatsoever of liability on the part of the said CORVINELLI
 CONSTRUCTION LIMITED;

AND WE hereby authorize and direct the releasee to pay the said
 consideration as follows:

To GORDON AND MARIA DARLING (\$5,000.00)

IN WITNESS WHEREOF, we have hereunto set our hand this 30th
 day of November, 1991.

SIGNED, SEALED AND DELIVERED
 in the presence of

Witness

Address

Gordon Henry Robertson Darling

Maria Grazie Darling

RECEIVED

DEC 06

WHITBY

As appears from the Release, in consideration of the sum of \$5,000, the Darlings were releasing and forever discharging the builder Corvinelli Construction from any and all actions, causes of actions, claims and demands for damages or loss, with respect to the house. The final part of the first paragraph states, "without limiting the generality of the foregoing, any claim or damages related to material and/or workmanship."

The Release was, therefore, very general in its terms and was only signed after the parties had negotiated it and, according to Mr. Darling, after he consulted with his own lawyer. In this respect, Mr. Darling has testified that he never showed the actual Release that was to be signed to the lawyer. It was not clear exactly what the lawyer was therefore passing his advice on. Mr. Darling stated that he himself believed that signing that Release would not affect any recourse he might have against the Program.

In response to a question from the Tribunal, Mr. Darling stated that he realized that the builder could be brought back into a position of liability if the Program were ordered to pay or decided to pay any claims after the Release was signed. Mr. Darling said that he also at that time did not inform the builder that he intended to continue his claim against the Program and he did not inform the Program of any such intention either.

In cross-examination, Mr. Darling stated that he does accounting and acts as an arbitrator for the Minister of Finance at the provincial level. He drafts recommendations after trying to arbitrate a tax matter which are in the nature of a judgement. He is, therefore, involved in a quasi judicial process and he has also done an introductory law course. He stated in response to a question on cross-examination, that he had reviewed the New Home Warranties Plan Act before signing the settlement and was aware of Section 13(4) of the present Regulations which at that point was Section 17(4) of the Regulations. That section applies to the rights of the Program where a buyer gives Releases or makes a settlement. As to the \$5,000 he received from the builder, he stated that this was first deposited in his bank account and later used to buy a heat pump. None of the monies were ever used to cover any of the repairs claimed against the Program.

The next witness to testify was Mr. Perryman who was then manager of the Program; he ceased to be in 1992. He wrote certain notes to file in tabs 8 and 9 of Exhibit 5 which indicate that he knew that Mr. Darling was negotiating with the builder. He stated that the thrust of Mr. Darling's interventions with him were that the Program put everything in a holding pattern until it could be seen whether a settlement could be reached and this, in order not to upset any potential settlement. The Program agreed to do so since if a settlement were reached, in Mr. Perryman's mind that would be a resolution of the problem and therefore allow the

Program to close its file on the matter. Under tab 9, Mr. Perryman indicates that he was informed of when the settlement was reached and also treated the matter as resolved.

A letter at tab 11 was sent by the Program to inform Mr. Darling of their understanding that the matter had been settled, a letter which Mr. Darling states he never received. It is clear from the letter, however, that the Program believed the case was closed and, therefore, did not write any decision letter in the file.

Mr. Perryman stated that at one point Mr. Darling told him that the settlement would include the brickwork as well as any other items in dispute. To a question by the Tribunal, Mr. Perryman said that Mr. Darling never asked him whether he would retain any right to sue the Program in the event there was a settlement.

The next person to testify was Mr. Corvinelli, the builder, who stated that he gave Mr. Darling the Certificate of Completion and Possession (Exhibit 14) and mentioned that there were concerns with regard to the brickwork, tiles and so on. He said that from his perspective, he could not cover Mr. Darling's concerns in the manner he wished and, therefore, he attempted to reach a settlement with Darling. He said that after negotiations which started at the figure \$2,000 and raised gradually to \$5,000, a settlement was reached which was to cover all of Mr. Darling's concerns. He said that Mr. Darling never said to him at any point that he intended to proceed against the Program after the settlement was signed.

Mr. Corvinelli stated in cross-examination that he had informed the Program that he was negotiating a settlement with Mr. Darling and that the Program was encouraging him in this. He stated that Mr. Darling received all required materials prescribed under Section 11(2) of the Ontario New Home Warranties Plan Act.

Mr. A. Stevenson testified that the Release signed by Mr. Darling is similar to what a homeowner would sign if a cash settlement were made with the Program.

The final witness was Mr. Kevin Rector, who issued the initial conciliation reports for the Program. He stated that he knew at the time that it was being carried out that Mr. Darling was trying to reach a settlement with the builder on all matters in dispute and that the Program was involved in the process; he encouraged the builder to settle.

Now, we stated at the outset that normally with what is before it, the Tribunal would have reached the judgement that the settlement released the New Home Warranty Program at the same time

as the builder and that, therefore, the case should not proceed. What has made it more complicated is a judgement of Jack Mandos and Libby Mandos and the Program which was rendered by the Ontario Court (General Division) Divisional Court under Court file 75/93 and dated September 16, 1993. Some believe that this judgment would treat the settlement as not releasing the Program.

After reading the judgement, the Tribunal believes that the facts in issue as well as the findings in Mandos are distinct from the case before it. In the Mandos case, we are dealing with a home where the construction was ongoing and had not been terminated, where there is dissatisfaction by the homeowners and, therefore, they had stopped making payments to the builder. The builder then took a lien against the home in the amount of \$6,902.02 for work already completed. There was a settlement reached whereby the homeowners agreed to pay to the builder \$5,000 and to allow the builder to walk away from the contract. At this point in time, the builder had not provided the purchasers with the required material under Section 11(2) of the Act, since the home had not been completed and it was found as a matter of fact that the owners were not aware therefor of any rights they might have under the Ontario New Home Warranties Plan Act. They had, therefore, signed an agreement without even being aware of the Ontario New Home Warranties Plan Act and their rights under it.

In the present case the house was completed. Mr. Darling took possession of it. All the requisite materials were given to him, and, even more important, Mr. Darling had familiarized himself with the Ontario New Home Warranties Plan Act and was aware of its contents. He had even read of certain cases rendered by this Tribunal. When he reached the settlement, he did so, therefore, with complete knowledge. As someone who is a professional and involved in a quasi judicial process, he would be able to understand the import of what he negotiated and signed. In the case of the Mandos, it was the contrary; they were ignorant of legal forms and of the general protection that they had.

In the case of the Mandos as well, not only did they not know their rights but they were forced to make a payment to the builder. In the present case, Mr. Darling received payment from the builder in return for granting a Release for his claims against the builder.

The Mandos case did not decide the extent of application of Section 13(6) of the Ontario New Home Warranties Plan Act because they did not feel it necessary to reach their decision. They held that even if Mandos did have the right to negotiate a settlement with the builder, the fact that they didn't receive requisite documentation, didn't know their rights, and did not receive any money from the builder, was sufficient to prove that

they signed a settlement which could not be sanctioned. For the settlement to be valid, they had to be fully aware of their rights and to have received the documentation required by the Act.

The facts in the case of Mr. Darling are exactly the opposite. He knew his rights, had received all required documentation, and was paid a substantial amount to satisfy his claim. If this Tribunal were to find that the Mandos case holds that under Section 13(6) of the Act, parties may not pursue amicable settlements which included waiving any further rights under the Ontario New Home Warranties Plan Act, the unacceptable result would be that every single dispute between a homeowner and builder would have to be resolved by this Tribunal. It goes without saying that if parties could reach settlements whereby one party is indemnified and the other party receives a Release, that no amicable settlements would be possible. The whole thrust of our judicial process, however, is one which allows the parties to freely settle disputes where they can. Were it to be otherwise, every man, woman and child in Canada would have to be a judge to settle all the disputes that arose. That plainly is not the intention of Mandos and of the Act. The Act itself speaks often of settlements as something to be encouraged.

Section 13(6) forbids waiving of warranties but only where the consumers waive them in advance, this is to assure that no consumer is deprived of his rights under the Act. But this is not the situation with Mr. Darling. He has not been asked to waive his rights under the Act. Rather, it is in exercising his rights and reaching a settlement whereby he received \$5,000 that he demonstrably received the benefits that the Act provides. It is because of the provisions of the Act that the builder was prepared to make the settlement. In reaching that settlement, Darling had to give something in return; that is the Release. He did fully knowing what a Release is.

Counsel for the Program has raised two other cases that deal with the sanctity of Releases, the case of Gissing v. T. Eaton Co. Ontario Law Reports and the case of Thorburn and Thorburn v. Danforth Bus Lines Ltd., a case of the Ontario High Court 1955 at p.501 D.L.R., where the courts clearly state that settlements reached and Releases given must be respected.

The Release signed by Mr. Darling was proper and signed after negotiations and consultation with professionals. As a result, an end was put to the dispute with the builder. This, ipso facto, also released the New Home Warranty Program from any claim. For these reasons, we find that the Release is in a proper form and has released the New Home Warranty Program; therefore, there is no need to proceed with a hearing on the merits as to whether there are defects in the house.

ANDY DIMATTEO CONSTRUCTION LTD.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REVOKE THE REGISTRATION

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, presiding
GURDIAL SINGH FIJI, Member
LOUIS A. RICE, Member

APPEARANCES:

RICHARD A. HUMPHREY, representing the Applicant,
Andy Dimatteo Construction Ltd.

NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATES OF

HEARING: 10 September 1993 Toronto

REASONS FOR DECISION AND ORDER

In a Notice of Proposal dated February 16, 1993, the Registrar seeks to revoke the registration of the appellant company on five grounds under the Act. Since however the parties are in agreement on the facts, the only issues being matters of law, the only allegation in the Proposal to be dealt with by this Tribunal is:

- (b) You have failed to comply with subsection 4 of Regulation 728 in that as a registrant you have failed to indemnify and save harmless the corporation under the Vendor/Builder Agreement from any loss which was itemized and sent to you in respect of invoice number(s) 66765-35 and 66765-34 in the amount of \$21,619.89 and \$23,971.04 respectively, which monies are owed by you in accordance with the provisions of the Vendor/Builder Agreement to which reference has been made.

The facts having been agreed upon by counsel are set out in an Agreed Statement of Facts and Issues which it is desirable to reproduce since it is from these that the issues of law arise.

REGISTRATION HISTORY

1. On or about March 22, 1984, the Ontario New Home Warranty Program (the "Warranty Program") granted registration to Andre DiMatteo as a sole proprietor. Mr. DiMatteo signed a standard form Vendor/Builder Agreement (Tab 1 of the Exhibit Brief).
2. In April of 1986 Mr. DiMatteo requested that his registration be transferred to his company, Andy DiMatteo Construction Ltd. ("DiMatteo Ltd."). DiMatteo Ltd. signed a standard form Vendor/Builder Agreement (Tab 2 of the Exhibit Brief). The registration was so transferred on July 9, 1986.
3. By Notice of Proposal dated February 13, 1993, the Warranty Program Registrar proposed to revoke the registration of DiMatteo Ltd. (Tab 3 of the Exhibit Brief).

CLAIM HISTORY

4. By Agreement of Purchase and Sale dated April 28, 1986, DiMatteo Ltd. agreed to sell a home to Gilles Brunet and Lona Brunet for a purchase price of \$89,100.00. The home is located at 590 Arnold Street in Sudbury.
5. On or about June 27, 1986, the Brunets took possession of the home.
6. On July 8, 1986 and subsequently thereafter, the Warranty Program received several written notices of claim from the Brunets regarding differential settlement of the home. The parties hereto agree that differential settlement did occur and that this constituted a breach of warranty under section 13(1) of the Ontario New Home Warranties Plan Act (the "Act").
7. On April 22, 1987, Ontario Regulation 219/88 was filed. This regulation amended Regulation 726, R.R.O. 1980, by increasing the limit of liability under 14(1)(b) and (c) from \$20,000.00 to \$50,000.00.

8. Between October of 1986 and October of 1988, DiMatteo Ltd. carried out cosmetic repairs to the home at its own expense in the approximate sum of \$11,000 in accordance with the recommendation of the engineer employed by the Warranty Program, Cantec Engineering Ltd. However, the settlement continued and caused further cracking of the brickwork, drywall and other associated problems.

9. In June of 1991, DiMatteo Ltd. offered to buy back the home from the Brunets for \$135,000.00. The Warranty Program agreed to contribute \$5,000.00 towards the buy-back price by way of a five-year interest-free loan to DiMatteo Ltd. The Brunets accepted the offer conditional upon finding a suitable new home. In September of 1991, the Brunets advised that they could not find a suitable new home and that they would therefore insist that the existing home be repaired.

10. By letter dated October 23, 1991, the solicitor for DiMatteo Ltd. took the position that the Warranty Program should insist upon the buy back offer or, alternatively, the Warranty Program should not expend repair costs exceeding the diminution in the value of the home. (Tab 4 of the Exhibit Brief)

11. By letter dated July 24, 1992, the Warranty Program notified DiMatteo Ltd. that it was tendering the repair work and that it estimated that the repair cost would be \$50,000.00. The Warranty Program further stated that it would look to DiMatteo Ltd. for reimbursement but that DiMatteo Ltd. had one last chance to deal with the Brunet home. (Tab 5 of the Exhibit Brief)

12. DiMatteo Ltd. refused to perform further repairs on the ground, *inter alia*, that the limit of liability was \$20,000.00 pursuant to s. 6(3) of Regulation 726, prior to the amendment enacted by O.Reg. 219/87. The Warranty Program took the position that the \$50,000.00 limit under O. Reg 219/87 applied.

13. The Warranty Program subsequently contracted out the repair work and incurred repair costs totalling \$40,399.26. On December 9, 1992, the Warranty Program issued two invoices totalling \$45,590.93, including G.S.T. and the standard 15% administration fee. On March 2, 1993, the Warranty Program issued a third invoice for \$492.20, including G.S.T. and the standard 15% administration fee. The administrative fees total \$5,617.61. The total of the invoices is \$46,083.13. DiMatteo Ltd. has not paid any of these invoices.

14. The Warranty Program has spent over 200 hours in administering this claim. The Warranty Program has also spent \$8,633.50 in engineering fees, which amount is not included in the aforementioned repair costs.

15. DiMatteo Ltd. concedes that it is liable to indemnify the Warranty Program for the repair costs and G.S.T., but submits that its liability is \$20,000.00 rather than \$46,083.13. Regarding the administrative fees, DiMatteo Ltd. takes the position that there is no authority for such fees in the Act and Regulations or Vendor/Builder Agreements, but if this Tribunal finds that there is such authority, it concedes that the amount claimed is reasonable. The Warranty Program submits that DiMatteo is liable for \$46,083.13, being the full amount of the invoices including the administrative fee.

ISSUES

16. The parties agreed that the only issues are as follows:
- (a) Is the limit of liability for this home \$20,000.00 pursuant to Ont. Reg. 726, R.R.O. 1980 or \$50,000.00 pursuant to Ont. Reg. 217/88?
 - (b) Do either of the aforementioned regulations limit the liability of a vendor to the Warranty Program, or do they merely limit the liability of the Warranty Program to an owner?

- (c) Is the Warranty Program entitled to indemnity for administrative fees under the Vendor/Builder Agreements and/or Regulation 894?
- (d) Based upon the answers to the foregoing issues, is DiMatteo Ltd. obligated to indemnify the Warranty Program in the amount of:
 - (i) \$20,000.00; or
 - (ii) \$40,465.52 (total of the invoices excluding the administrative fees);
 - (iii) \$46,083.13 (total of the invoices including the administrative fees).

On the first issue, what is the liability under the Act for repairs to this home \$20,000 as conceded by the appellant or \$50,000 as contended by the Program?

At the time of the first claim on July 8, 1986, Regulation 726, subsection 6(4) limited liability under Section 14(1)(b) to \$20,000. The claims continued to be addressed but not satisfied over the succeeding months and years, and under Regulation 308/88, the limit of liability was raised to \$50,000. This liability was defined in Regulation 726 6(3) as follows:

- (3) The maximum amount payable to an owner in respect of warranty coverage under the Act or regulations shall not exceed \$50,000.

The text of the regulation is important in light of the argument advanced by the appellant's counsel.

It is clear from the language of both regulations that they create an obligation on the Program to repair or pay to the owner a maximum amount defined by the Regulation. If the claim is made in 1986, the limit is \$20,000 whereas if made in 1988, it is \$50,000 and that creates no issue. But it appears the issue arises because of the continuing claims of the owner that his house is sinking and neither the Program nor the builder have been able to address it successfully since the claim was first made in 1986. Because the claim is again made in 1988, has the liability changed to \$50,000?

The courts have frequently used the words retrospective and retroactive as interchangeable in reference to the application of the Statute to fact situations occurring before the legislation became law. We prefer in this matter to use the word retroactive in asking whether Regulation 726 6(3) created an increased obligation on the Program in its attempt to resolve a problem which arose before the Regulation was enacted. In other words, is the Regulation retroactive?

The case of Martelli vs. Martelli [1982] 2 W.W.R. 638 (B.C.C.A.) quoted in the C.E.D. Third Edition sets out the law at page 260:

The rules regarding retroactive and retrospective application of statutes have recently been stated as follows. If there is any doubt, a statute should not be given a retroactive application. That means it should not be interpreted so that a legal relationship or transaction that occurred before the Act was passed is considered, after the Act is passed, to have a character at the time it was entered into that is different from the character that it had when it was entered into under the law in effect when it was entered into. It is also true that, if there is any doubt, a statute should not be given a retrospective application that interferes with vested rights. That means it should not be interpreted so that a specific legal relationship or transaction that occurred before the Act was passed is considered, after the Act is passed, to have a character after the Act is passed that is different from the character that it had at the time it was entered into.

and

The intention to make a statute retrospective must appear from the words of the statute itself, and where the result of giving a retroactive interpretation leads to unreasonableness, the statute will not be given a retroactive effect. This is particularly so where a retrospective interpretation would act to impose new duties or attach new disabilities in respect of a past transaction.

And in the matter of Mitts v. LeClair (1957), 10 D.L.R. (2d) 662 (Ont.):

Where during the pendency of an action the law is altered, the rights of the parties are decided according to the law as it existed when the action was commenced, unless the new statute clearly shows an intention to vary such rights.

In Cross, Statutory Interpretation (2d ed. 1987) at p.185, we find we find Wright J. quoted in the case of Re Athlumney [1989] 2 QB 547 at 551:

Perhaps no rule of construction is more firmly established than this - that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.

In Maxwell on Interpretation of Statutes (12th ed.) at p.215, the author deals with the retrospective operation of statutes:

Upon the presumption that the Legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. They are construed as operating only in cases or on facts which come into existence after the statutes are passed unless a retrospective effect is clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation and as the construction appears very clearly in the terms of the Act or arises by necessary and distinct implication.

West vs. Gwynne [1911] 2 Ch.1

In the case of Marciniak et al. and Royal Insurance Co. of Canada 24 O.R. (2d) at p.477, the issue was addressed by Eberle, J. at 478:

This application apparently raises for the first time an interesting question arising out of the amendment of O.Reg.161/78 effective July 1, 1978 to Sch.E of the Insurance Act R.S.O. 1970 c.224. The amendment increased the maximum amount of disability benefits for loss of income from \$70 per week to \$140 per week. The question is: "Do the new rates or the former rates apply to an insured person who has been injured in an accident occurring prior to the effective date of the amendment?"

At page 479 the Court said:

In considering the problem, it must first be recognized that there is a presumption against retrospective effect. In support of their position, the Applicants argue that the disability payments are awarded for a period of disability and that when the period of disability extends beyond July 1, 1978, they are entitled to the higher rates in effect from that date.

I find that much weight should be given to the legislative intent expressed so clearly in s.27 as amended by the 1972 Insurance Amendment Act. My conclusion is that the intent of the subordinate legislation of 1978 was to make its provisions apply to existing policies exactly the same way as the Sch. E. benefits were originally applied to existing policies. That is, to apply them to policies in existence on July 1, 1978 in so far as claims are made under them arising out of accidents occurring on and after but not before the effective date of the amendment...

In the result, therefore, I find and declare that the applicants are not

entitled to receive total disability benefits in the amount of \$140 per week each pursuant to Royal Insurance Policy No. A9026755.

In his argument against the retroactivity of the regulation, Mr. Humphrey points to the amendment to Regulation 726 filed on March 21, 1991 which says:

In the case of a home of a type referred to in subclause 1(d)(i) and (ii) of the Act, the maximum amount payable to an owner out of the guarantee fund in respect of a claim made after August 1, 1989, under Clause 14(1)(b) or (c) of the Act is \$100,000.00.

He contends this amendment was retroactive in that it covered claims back to 1989, but there is no specific language making the previous amendment retroactive and, therefore by implication it was not intended to be so by the Legislature.

In our view, the rules set out in both Maxwell and Croft and supported by the case law clearly apply to the matter before us. The cause of action if it may so termed began when the first claim was made on July 8, 1986. The warranty took effect from June 27, 1986, the date of possession (Section 13(3)) and in this matter since the claim was made under Section 13(1) ran for a period of one year during which time the claim was made. The fact that the claim continued after the Regulation was changed did not alter the initial liability which simply continued under Section 14(1)(b) in the amount of \$20,000. There is no evidence before us that Regulation 76 6(3)/88 was intended to be retroactive nor is there evidence of a new claim being made since it appears the same complaint simply continued until it was finally addressed by the Program but at a cost of \$46,083.13.

We are, therefore, of the opinion that the liability of the Program to the owner at the date of resolution and settlement of the matter in 1992 was \$20,000.

The second question is: do either of the aforementioned Regulations limit the liability of a vendor to the Warranty Program or do they merely limit the liabilities of the Warranty Program to an owner?

The liability of a vendor to the Program is statutory and

contractual. It arises both from Section 13(1) and (2) of Regulation 892 and Section 4 of Regulation 894 which have created the statutory obligation. By Section 13(1) and (2), the Program is subrogated to all rights acquired by the owner under the Act.

13(1) The Corporation shall be subrogated to all rights of recovery of a person to whom payment in respect of a claim has been made out of the guarantee fund under the Act and may maintain an action in its own name or the name of the person against any other person against whom the action lies in respect of such rights of recovery.

(2) The Corporation is entitled under its rights of recovery to conduct legal proceedings, including an action for damages, the quantum of which shall be limited to the amount paid out of the guarantee fund by the Corporation to the person whose rights are subrogated to the Corporation, including any legal costs, plus all costs incurred by the Corporation in the subrogated action.

and

1.4. The registrant shall indemnify and save harmless the Corporation and the insurers for the time being under any contract or contracts of insurance establishing the guarantee fund, from any loss which they or any of them may suffer by reason of the registrant's failure to diligently perform or cause to be performed all obligations imposed under the Plan and under any agreement made with the Corporation in respect of the Plan.

Where the owner has a cause of action against a vendor under Section 14(1)(b), the Program in payment out of the guarantee fund certain monies to satisfy the claim of the owner has by this section the right to recover from the vendor.

Similarly under section 4, the vendor is obligated to indemnify the Corporation for any loss incurred by payment out of the fund. The amount payable is limited by the Regulation in effect at the time that the claim was made. In the case before us, the limit is \$20,000 which is the limit of the Program's liability

to the owner. There is, however, a contractual obligation imposed upon the vendor through the Vendor/Builder Agreement with the New Home Warranty Program. In this matter, the contract is dated July 9, 1986 and provides in Section 4.2:

- (2) The Vendor shall diligently perform his obligations under each construction contract but in the event of his failure to do so, or in the event of his bankruptcy, the Vendor shall pay to the owner the amount of all damages for defective work in respect of the house resulting therefrom and shall indemnify and hold harmless the Corporation and its insurers from any loss which they or any of them may suffer by reason of the Vendor's failure to pay such moneys.

And in Section 4.4(2):

- (2) The Vendor shall diligently perform his warranty obligations under the Act including his obligations in respect of each warranty certificate issued by the Corporation, and shall indemnify and save harmless the Corporation and its insurers from any loss which they or any of them may suffer by reason of the Vendor's failure to do so.

Does this contract then increase the limit of the vendor's liability to the Program? We think not. The contract is an undertaking by the builder to indemnify the Program for any loss it suffered by reason of the Vendor's failure to perform his warranty obligations. We have found the Program's obligation under the statute to be \$20,000 and the agreement provides for indemnity to the Program for any liability for loss. Since the maximum liability to the owner imposed upon the Program was \$20,000, it cannot under either of the regulations or the agreement to indemnify demand more.

The indemnity agreement is a guarantee under which the vendor undertakes to indemnify the Program for the maximum loss it may incur in its obligation to the owner. But that loss is defined and limited by the statute and the vendor or builder has undertaken to guarantee repayment of only that amount. He can be held liable for no more subject to the following obligation which is dealt with in the answer to the next question.

The third question arises out of the Program's policy of charging 15% administration fees and adding it to the balance owed by the builder/vendor. We note this charge has been deemed to be reasonable under almost all the cases decided by this Tribunal with the exception of 523205 (Global Construction) 20 CRAT (1990) p.248.

It may be conceded there is no explicit statutory authority, but the weight of the decisions and particularly those which have been reviewed by a higher court persuade us the charge is a loss for which the builder is liable.

In the case of DeSoto Developments Ltd. 20 CRAT (1990) p.216, the Tribunal said:

On each of the invoices noted under the detailed review of the 14 examples of properties brought before this Tribunal, an administrative cost in the amount of 15% has been added to the cash settlement or contractual price where the work had been done. The Tribunal sought advice from counsel with respect to the authority to charge this administrative cost.

Counsel for the Program noted that the Tribunal is dealing with statutory breaches pursuant to Regulation 728 and sections 3 and 4 thereof. The registrant is obliged to do certain duties and the matter of indemnification for "any loss" is set out. Letters which go to the registrant state that invoices will be sent and in counsel's opinion, the time and effort spent by the New Home Warranty Program in the necessary administration is a loss. Further, in his view, a general figure of 15% is not out of line with normal administrative costs and the builder, of course, should have done the work so that he can avoid paying that fee.

Beyond the statute, it was noted that the Vendor/Builder Agreement is contractual and again, it refers to "any loss" under Item 4.4(2). Then as a third point, counsel for the Program referred the Tribunal to analogous comments in the

decision of Mr. Justice Rosenberg in the York Condominium Corporation No. 528 and New Home Warranty Program (1989) CRAT Vol.19, p.162. In his view, interest was added in this case because it was sensible to do so and, therefore, these administrative costs are equally sensible.

The Tribunal is prepared to accept the administrative costs as being a reasonable figure at the rate of 15% and as being a necessary addition to the various invoices which are submitted to builders.

In this case, the matter went to the Divisional Court on appeal and we note the Court did not disturb the 15% claim by the Program and awarded by the Tribunal.

We are, therefore, of the view that the Program is entitled to recover 15% of its costs, but only to the extent of its \$20,000 liability to the owner.

It is, therefore, the finding of this Tribunal that the answer to:

(a) Is the limit of liability for this home \$20,000 pursuant to Ontario Reg. 726 R.R.O. 1980 or \$50,000 pursuant Ontario Reg.217/88?

A: \$20,000 pursuant to Ontario Reg. 726 R.R.R. 1980

(b) Do either of the aforementioned Regulations limit the liability of a vendor to the Warranty Program or do they merely limit the liability of the Warranty Program to the owner?

A: The Regulations limit the liability of both a vendor to the Warranty Program and the Warranty Program to an owner.

(c) Is the Warranty Program entitled to indemnity for administration fees under the Vendor/Builder Agreements and/or Regulation 894?

A: Yes. Under Regulation 894 1.4.

(d) DiMatteo Ltd. is obligated to indemnify the Warranty Program in the amount of \$20,000, together with 15% administration fees in the sum of \$3,000, the total being \$23,000.

In the Notice of Proposal, the Registrar seeks to revoke the registration of the appellant company, but since there was no evidence presented by the Program on the allegations contained in Section 1(a)(b)(c) and Section 2(a), we shall not deal with them.

With regard to 2(b) in which it is alleged the builder failed to comply with subsection (4) of Regulation 728 in that it failed to indemnify the Program, we are of the view that the question was that the quantum was an issue and the builder has properly brought the question before this Tribunal for adjudication.

Since, however, the Tribunal has found the appellant's obligation to the Ontario New Home Warranty Plan to be in the sum of \$23,000, we hereby direct the Registrar to carry out his Proposal if the appellant is in default in its obligation under Regulation 894(4) after 60 days of the release of this decision.

The above decision was appealed to the Ontario Court (General Division) Divisional Court. The appeal had not been concluded at the time of this publication.

THE ESTATE OF JOHN FREDERICK EARLE
DALE PRAUGHT

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JUDITH KILLORAN, CHAIR presiding

APPEARANCES:

ROSS B. LUNDY, representing Mr. Praught
PAUL EARLE, representing the estate of John Frederick Earle
PAUL SCARPONI, representing Creekside Properties Ltd.
BRIAN CAMPBELL, representing the Ontario New Home Warranty Program

DATES OF

HEARING: 1, 2, 28 March 1994

Toronto

REASONS FOR DECISION AND ORDER

Dale Praught and the estate of John Frederick Earle (the "applicants") appeal decisions of the Ontario New Home Warranty Program to deny their claims for deposit refunds under section 14 (1)(a) of the Ontario New Home Warranties Plan Act (the "Act"). These appeals have been joined because they involve similar issues and have questions of law and fact in common.

In separate decision letters dated January 15, 1993, the Program, in an attempt to settle the claims of the applicants, offered \$20,000 to each, with the condition that if the decisions were appealed, the Program reserved its right to argue before the Tribunal that the applicants were in fact, investors, and not entitled to the protection of the Act.

The applicants are seeking the return of \$50,000 each, as a result of six purchase agreements with Creekside Properties Ltd. dated July 6, 1990 but actually signed in January 1991. According to the agreements, each applicant had made deposits of \$20,000 on two houses and a deposit of \$10,000 on a third home.

The Tribunal heard evidence from Paul Earle, Dale Praught, Marshall Townsend, Domenic Luciano and Sgt. Knapton on behalf of the applicants. The Tribunal also heard evidence from Paul Scarponi on behalf of the builder. The Program, however,

declined to call any evidence and argued that the applicants' evidence alone was sufficient to support a finding that they were not entitled to refund of their deposit claims. The Tribunal agrees with the position taken by the Program.

The applicants' claims are based on section 14(1)(a) of the Act:

Where, a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract ...

Such claims are limited by Regulation 892 of the Act, section 6(1):

A purchaser who has a claim under clause 14 (1)(a) of the Act in respect of a purchase agreement entered into after the 30th day of June, 1989 is entitled to be paid out of the guarantee fund an amount for damages arising from the breach of the agreement by the vendor that does not exceed \$20,000.

To bring their claims within section 14(1)(a), the applicants were required to establish that they had entered into a contract with a vendor for the provision of a home and that they suffered financial loss resulting from the vendor's failure to perform the contract.

Dale Praught gave evidence that he signed a purchase agreement with Parkview Estates Subdivision on August 16, 1989 whereby he made a deposit of \$5,000 toward the purchase of a new home with a purchase price of \$104,900. He was approached by Paul Earle in January of 1990 to buy another house.

As a result, Praught signed a new purchase agreement dated January 16, 1990 with 876502 Ontario Inc. 876502 Ontario Inc. was incorporated on January 11, 1990 with Brad Sharpley and Paul Scarponi as directors and Paul Earle as vice-president. Praught testified that this agreement was to supersede the first agreement which failed to close as scheduled on October 1990. Pursuant to the second agreement, Praught paid a \$50,000 deposit toward a house with a purchase price of \$50,000.

Praught signed an addendum to the second agreement on January 17, 1990. This "acknowledgement and undertaking" confirmed that he would not only receive a new home but also the return of his \$50,000 deposit at closing, which was scheduled for March 31, 1991.

In January of 1991, according to Praught's testimony, Paul Earle approached him with a proposal to redistribute his \$50,000 deposit toward the purchase of three homes with a purchase price of \$89,000 each. Although these three new agreements were signed by him in January of 1991, they were dated July 6, 1990 with a common closing date of July 30, 1991. Paul Earle signed a release dated July 5, 1990 transferring his two shares in 876502 Ontario Inc. to Paul Scarponi.

On cross-examination, Praught admitted that the \$5,000 deposit paid by him in relation to the first purchase agreement had been returned. He stated that it was his understanding that Paul Earle was the Vice President of 876502 Ontario Inc. and signed the purchase agreement dated January 16, 1990 and Addendum on its behalf. Further, Praught stated that his deposit of \$50,000 was to be held in trust until the money was needed for the purpose of acquiring land for the development. He admitted that the money was not designated for building a home on Lot 35-A, which was referred to in the purchase agreement. He repeated that his understanding was that his \$50,000 deposit was to be applied toward start-up costs associated with the land purchase by 876502 Ontario Inc. from Niagara Parkview Developments Ltd.

On cross-examination, Praught explained that he was concerned when Earle informed him that his deposit was no longer in trust in January of 1991. It was at that time that Earle approached him with the three purchase agreements. Praught stated that he did not know why the agreements were back-dated. As well, he acknowledged that no cheque was made out by him in January of 1991 to Creekside Properties Ltd. In other words, it was his original \$50,000 investment which was to be apportioned as deposit money for the three agreements.

Praught spoke to Mr. Hart of the Program about his concerns regarding the development and filled out claim forms for the return of his deposits on March 11, 1991 although he admitted that the closings for the houses were not scheduled until July 30, 1991 with the possibility of extending the closings to January 30, 1992.

Earle testified that he spoke to Paul Scarponi in the spring of 1989 about buying a home. It was in January of 1990 that he claimed Paul Scarponi presented him with the proposal that if he invested \$50,000 to assist in the land purchase by 876502 Ontario Inc., he would receive a home and the return of \$50,000. Earle persuaded his father, John Earle, and his friend, Dale Praught, to invest \$50,000 each. On January 17, 1990, his father

signed an acknowledgment and undertaking identical to that signed by Praught.

Earle stated that he confirmed in September of 1990 with Domenic Luciano that the \$50,000 each paid by the applicants was no longer in trust. It was at that point that he met with Paul Scarponi, whom he said typed up the six purchase agreements in question. These agreements were not presented to the applicants until January of 1991.

Earle confirmed that he also spoke to Mr. Hart at the Program about his concerns and he was advised to have his father fill out a claim form. He advised Praught to talk to Mr. Hart. In April and May of 1991, Paul Scarponi, Paul Earle and Dale Praught were charged with conspiring to defraud the Program. All of the accused were acquitted of this charge.

Much was made of the fact that Earle and Praught were acquitted of the criminal charge of conspiracy to defraud the Program. However, the role of this Tribunal is not to determine whether there was a criminal conspiracy to defraud the Program. Rather, this Tribunal is restricted to determining whether the applicants meet the requirements for compensation under section 14 (1)(a) of the Act. At the criminal trial, the Crown was required to establish the defendants' guilt beyond a reasonable doubt and failed to discharge this onus. At this hearing, the applicants bear the burden of proof and must convince the Tribunal that they are entitled to refund of their money pursuant to section 14 (1)(a) of the Act.

Counsel for the Program argued that no money was paid on account of the six purchase agreements in question. He argued that the applicants had paid \$50,000 each one year earlier to 876502 Ontario Inc. to secure the purchase price of 13 acres of land. For that reason, the debt owed by 876502 Ontario Inc. to the applicants could not be used as a set-off in future transactions. To do so, would be in the nature of a contra account.

The Program's argument was that the disentitlement of the applicants to compensation was confirmed by their own evidence. Both Praught and Earle admitted that the money which was given to 876502 Ontario Inc. was not to be used for the purchase of any houses. Instead, this was referred to as the "deal of a lifetime" whereby, according to Exhibit 25, the \$50,000 was to be returned to each applicant together with a home for free. As a result of discovering that this money was no longer in trust, the applicants signed three purchase agreements each to secure the \$50,000 each had invested.

The applicants made refund claims to the Program prior to the vendor being in breach of their agreements. The reasons provided on the claim forms related to the land deal and Praught admitted that the purchase agreements were signed by him to avoid losing his investment.

Earle signed the purchase agreement dated January 11, 1990 with Niagara Parkview as an officer of 876502 Ontario Inc. and knew that the \$100,00 was to be directed toward the land assembly. His father, John Earle, made his claims to the Program for refund of his money on February 12, 1991, within three weeks of signing the purchase agreements.

In the Ross McDonagh and Joseph Palmerio case released on April 27, 1979 by CRAT, Marvo Construction Co. Ltd. owed \$86,000 to Leader Construction (Ontario) Limited from prior business dealings which were unrelated to the construction of the condominium building which was the subject of the proceeding. The applicants were the principals of Leader Construction (Ontario) Limited. This debt, it was alleged, was assigned to the applicants.

According to the applicants in the above case, they entered into purchase agreements for condominium units and the debt owed by Marvo to Leader was forgiven by setting off the cost of the units against this debt. However, the tribunal found no proof of any money owed by Leader to the applicants; no money paid by the applicants to Marvo by way of deposit or otherwise; no proof of any transfer of the units by the companies to the applicants; the contrad account after the Agreements were signed was not a deposit by the applicants under the Act, its Regulations or by definition; and the applicants suffered no financial loss.

Counsel for the Program argued that just as no money was advanced pursuant to the purchase agreements in the above case, no money was advanced in consideration for the six purchase agreements in this case. Any money paid was advanced one year earlier as an investment in land and it was paid by the applicants to 876502 Ontario Inc. not Creekside Properties Ltd. There was no evidence presented of any assignment of this debt and no evidence of any loss resulting from the purchase agreements as no deposits were made. At the time the applicants made their claims there was no breach by the vendor/builder.

The decision by CRAT in McDonagh and Palmerio was appealed to Divisional Court and upheld. The court ruled:

In our view, the plan under this statute is designed to guarantee damage or financial loss arising out of contractual

relationships between a vendor and an owner in relation to a specific property. It was not designed to guarantee debts owing between such parties that have no bearing or relation to such a contractual relationship as exists in the present case.

Debts between contractors and sub-contractors unrelated to a specific agreement of purchase and sale of a specific property are clearly not within the scope of the legislation. In this case the tribunal found as a fact that there was no proof of a transfer of the interest of Leader Construction in the subject properties to the applicants and that the applicants suffered no financial loss. These findings were supported by the evidence before the tribunal.

Although counsel for Praught attempted to distinguish the above case from the present, this Tribunal respectfully disagrees. The same elements which were lacking in McDonagh and Palmerio in order for the applicants to be successful when claiming their deposit refunds are lacking in the present circumstances.

Accordingly, by virtue of the authority vested in it by section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claims of the applicants.

RICHARD AND THERESA ENTWISTLE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
SELWYN CHARLES, Member
EDWARD WEISZ, Member

APPEARANCES:
RICHARD AND THERESA ENTWISTLE,
appearing on their own behalf

IAN ANDERSON, representing the
Ontario New Home Warranty Program

DATES OF 1 June, 13 September; and
HEARING: 14 and 15 December 1993. Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from a decision of the Ontario New Home Warranty Program set out in a letter dated September 11, 1991 from its manager in the Newmarket Regional Office to the Applicants. There are a number of features about this case which are out of the ordinary. We are concerned here with a pre-fabricated home bought from and installed on the home-site by a supplier of such homes, Brockwood Homes Limited. The Applicants, and particularly the Applicant Richard Entwistle, who presented the case himself to the Tribunal went to considerable time and trouble to prepare and present evidence in support of their case. He had prepared and presented at the outset six briefs of documents, Exhibits 5 through 10 and about 189 photographs found in Exhibits 11 through 21, 23 through 29, and 31. Mr. Entwistle gave evidence at considerable length referring extensively to these exhibits.

The defence, on behalf of the Program, also presented evidence at length, calling two professional engineers, Mr. Tibor Pal and Mr. V.F. Wilcox, and also the President of the Vendor/Builder from whom the home was purchased, Mr. Robert Durand,

and two witnesses employed by the Program at the material times, Mr. Jack Hussman and Mr. George Stinson. All of this resulted in a great deal of detailed evidence and makes it particularly important at the outset to identify the issues which we must determine and the evidence bearing upon them.

In the decision letter, found at tab 25 of Exhibit 4, there are listed by number three main headings of complaints:

1. Water leakage - basement floor, basement walls, sill plate.
2. Cracks - walls, floor and footings, vertical through blocks from top of wall to floor, outside parging through tar.
3. Damage to structure sitting on the foundation which would not have occurred if the foundation was done properly in the first place.

This was followed by more detailed references to specific complaints, the observations of the Program's representative with regard to them and the conclusion of the Program based upon all of this. It is from these findings that the appellants appeal to this Tribunal. In order to assess these findings, it is necessary to review the evidence.

On June 23, 1989, the Applicants entered into a written agreement with Brockwood Homes Limited to provide and install upon their premises on a lot near Brechin in the Township of Mara a pre-fabricated house from Royal Homes for the sum of \$102,260.00. There were a number of schedules attached with specifications, terms and conditions. There are three of these of special significance. Under the heading "Foundation Specifications", #7 provides: "Basement rough backfilled with subsoil from basement excavation." Under the heading "Not Included", #2 reads: "Any additional fill required, levelling and excavation thereof (around foundation, driveways etc.)" and #3 reads, "Levelling of topsoil or excess fill; final grading." (see tab 1 of Exhibit 4).

The circumstances which led to most of the problems are summarized under a heading "Circumstances Surrounding Basement Problem" found at tab 2 of Exhibit 6.

In mid-November of 1989, excavation was commenced at the Entwistle site as per contract dated June 23, 1989. The basement was completed shortly thereafter awaiting delivery of the home on November 28, 1989. The exposed footings of the basement were covered with straw in an effort to protect them from any below freezing condition. In late November of 1989, prior to the delivery of the house, outside temperatures dropped suddenly and severely to as far as 20 degrees below zero. Water from a recent rainfall appeared to have settled around the footings and subsequently froze causing them to crack in several areas. The concrete blocks also suffered vertical cracking as a result. Admittedly, inadequate protection of the footings with the straw may have also contributed to the situation.

This foundation was included in the sales agreement, see the second sheet of tab 1 of Exhibit 4, second item: "11 block basement - included". This is also found at tab 2 of Exhibit 10. The second page of tab 4 of Exhibit 10 shows a sketch of the foundation plans and refers to an 11 course concrete block wall.

Mr. Entwistle took his first photographs on November 4, 1989, which are Exhibits 11A through H. These show the poured footings in place with the wooden forms still around it and concrete blocks stacked to build on top of it. There is no evidence of any frost protection to be seen. A climatological station report from Gainbridge, Ontario shows for November 4, 1989 a maximum temperature of -4 degrees celsius and a minimum of -10 degrees celsius (see tab 9 of Exhibit 9). There is no doubt that real damage was done to this concrete block wall by reason of heaving of the ground under it from frost and subsequent settling after thawing and this is admitted by the Program.

It was the evidence of Mr. Entwistle that all of this resulted in warrantable defects in these walls, both by way of substandard workmanship and by way of breaches of the Ontario Building Code. His next set of photographs (Exhibit 12) show the block wall in place and the placing of the prefabricated house upon it. These were taken on November 28, 1989. Exhibit 13, photographs taken on January 6, 1990, show the condition of the concrete block walls at that time. Exhibit 14, photographs taken on January 26, 1990 show the state of completion of the exterior of the house by that date. These last two sets of photographs confirm Mr. Entwistle's evidence that the basement floor was poured between those two dates of January 6 and 26, 1990, as it is not there on the first date and is in place by the second.

The next set of photographs taken by Mr. Entwistle was on July 13, 1990, being Exhibit 15. These show areas where repairs had been made to the block walls. It was the evidence of Mr. Entwistle that, as a result of his complaints, Brockwood Homes had Mr. V.W. Wilcox, a Consulting Engineer with Barrie Inspection and

Testing Ltd. attend at the premises to carry out an engineering assessment of the frost damage to the foundation of this building and make recommendations. Mr. Wilcox wrote a report to Brockwood dated March 26, 1990, in which he stated:

It is evident from the nature and extent of cracking in the walls and footings that the soil on which the footings rest is a fine grained, frost susceptible material and that the frost protection measures employed at the time winter set in were insufficient.

Damage has occurred, caused by frost uplift under the footing, at locations along the south, west and north walls of the basement and additionally some lateral displacement has occurred at its east wall. There is significant lateral movement also in a south stairwell wall and at a location just eastward from the stairwell at the north east corner of the garage. We note that at most locations excavations have been made recently to expose these cracks from the exterior. We note that at two of those excavations the soil under the footing in the crack area has been removed for underpinning.

As discussed with your site representative, and with Mr. Payne of the Township who was present when our engineer attended, we have concluded that the house is in the main not seriously impaired structurally, except where masonry has been displaced laterally. We propose there is a significant impairment of the dampproofing membrane at all masonry crack locations, and that as a minimum the following remedial work needs to be done-

- a) replace soil under footings where now excavated using low slump concrete to limit shrinkage.
- b) fill cavities in block at crack locations for all cracks not evincing lateral displacement, then repair and restore the parging and dampproof membranes on out face of the walls, repair perimeter tile and backfill.
- c) where lateral movements have occurred that have not settled back these sections of wall will have to be taken down and new masonry used as replacement. Support the house appropriately during this construction. Parge and redampproof to provide code conformance.

(see tab 2 of Exhibit 8)

As a result of this, Brockwood arranged for certain repairs and some of these are shown in the photographs in Exhibit 15.

The next set of photographs presented by Mr. Entwistle were taken on October 4, 1990 and are Exhibit 16. He took these to illustrate cracks in the foundation walls. In assessing this problem this evidence must be considered together with the evidence of the other witnesses who inspected these walls to which we shall refer later. Exhibit 17 is the next set of four photographs taken on October 19, 1990 showing the level of the backfill as finished at that time around the outside of the house. This, together with other evidence given to us shows that this level was lower than what was required. Mr. Wilcox deals with this problem in another letter dated January 31, 1991 to Brockwood Homes (tab 5 of Exhibit 8 in which he says:

It appears the measures advised as remedial work in our March 26th correspondence have been carried out. It appears also that we did not specifically, in that correspondence, advise backfilling for frost protection. However in defence that advice would have appeared unnecessary in the circumstance the original problems were due to frost action.

and later:

It is probably not important to determine which frost penetration caused the "frost action" except to perhaps shed some light on the unusual phenomenon that the cracks in the basement floor slab seem to be opening up, even though the basement space is a heated space. The likely explanation is that the floor is not moving at its centre (not heaving) but is rather going down at its edges. This would happen if the structural loads on basement walls were causing them to settle, i.e causing compression of the soil under the wall footing.

and finally:

In our view if frost does not reach below the footings later this winter then the situation has stabilized, in which case it remains solely a matter for Mr. Hussman to rule whether the conditions now existing, that distress Mr & Mrs Entwistle, are severe enough to be considered as warrantable defects. If frost does reach below the footings later this winter then that opens up the question of who was responsible for not bringing the perimeter fill up to grade. That is a matter for a legal opinion.

The next sets of photographs are found in Exhibit 18, taken March 28, 1991 to show evidence of water and water damage on the basement floor in various areas and in Exhibit 19 taken on April 22, 1991 to show evidence of water and water damage to the basement wall. In giving his evidence at this point, Mr. Entwistle referred next to certain correspondence and reports which indicate that the issues here are, to what extent did such water enter, did this result from cracks in the foundation walls or from fault with the backfilling and the grade outside and, if the latter, whose responsibility was this?

The next photographs, Exhibit 20, taken on August 15, 1991 and Exhibit 21 taken on August 16, 1991 also were tendered to show water leakage through these walls and into the basement following rainstorms at that time. At this point in his testimony, Mr. Entwistle referred us to a copy of a letter dated August 27, 1991 between the officials of the Ministry of Consumer and Commercial Relations who were dealing with this matter in which the Director of Consumer Services said to the Legal Policy Adviser,

My assessment of the root of the problem is that Mr. Entwistle is insistent on having a new foundation for his home and will accept nothing short of that. Based on Tibor's report, the situation is not serious enough to warrant that extensive effort. Further, Mr. Entwistle has failed to complete the required backfilling, which was his responsibility as per his agreement with his builder. His failure to finish the backfilling has been an ongoing contributor to the problems with his basement.

(see tab 32 of Exhibit 5)

While he did this as part of the narrative of what happened, it is to be noted that, on this occasion, as he did on a number of others, Mr. Entwistle very fairly brought to our attention the position of the other side, as well as his own.

His next photographs are Exhibit 22, taken on September 6, 1991 to show water penetration in the basement at that time and he asked us to note particularly cracks in the wall shown in Exhibits 22A and 22B. He moved on from there to photographs taken March 10, 1992 (Exhibit 23) and April 17, 1992 (Exhibit 24) to show water penetration into the basement at those times, the first of which he said showed penetration through a place where repairs had previously been made and the second in the area of a rough in for a washroom.

Mr. Entwistle came next to the photographs to show damage on the outside of the house in the Spring of 1992, Exhibit 25 taken on April 23, 1992 to show cracks on the outside of the walls, and Exhibit 26 taken also on April 23. There are 23 photographs in this last group showing the walls all the way around the perimeter on the outside.

The next photographs are in Exhibit 27 taken July 5, 1992 to show water damage inside the house and Exhibit 28 taken September 10, 1992 to show cracks in the juncture of the basement walls and water penetration through these and in Exhibit 29 taken October 23, 1992 showing cracks on the inside of the basement walls at that time and evidence of water coming through them.

The final group of photographs, Exhibit 31, were taken during the course of this hearing on July 11, 1993. These are all photographs of the basement walls, some from the inside and some from the outside showing cracks and evidence of water penetration at that time. Having filed all of these photographs, Mr. Entwistle gave evidence at considerable length referring to individual photographs as identified explaining what they showed.

On cross-examination, Mr. Entwistle marked certain information on a plan or sketch of the basement of the house being the third sheet at tab 5 of Exhibit 4 where the cracks through the basement walls are marked in red, some going all the way through and some part way through as shown, the existence of wet spots are marked, two popped lag bolts are marked and a number of other things are indicated.

All parties to the hearing agreed that these things shown by these marks on the plan were correct. Mr. Entwistle also agreed that the block wall for the basement was to be 11 blocks high. There is a note "11 course concrete blocks" on the sheet abovementioned and the actual wall to be built as shown on a plan signed by both of the Applicants and found at the second last page of tab 5 of Exhibit 10 where one can count 11 blocks.

To install the footings, Mr. Entwistle said they removed the topsoil and excavated not more than 2' and poured the footings on October 31, 1989. He said he knew the footings were heaved by frost, but did not know if the concrete itself was damaged. He agreed that the Agreement of Purchase and Sale provided that the owners were responsible for the final grading and he said that he had never had any additional fill brought in or had anything done about the grade.

In answer to questions about water in the basement, he said the whole floor was under water with the first rain after they moved in. An important reason for this appears to have been the failure of the sump pump and Mr. Entwistle in fact replaced it. He said that he has never been able to put in a bedroom downstairs as he had planned and has not been able to insulate the walls and finish them either for the same reason.

As the owners continued to complain and the builder came back and did certain work, the relationship between them deteriorated to the point that in or about July of 1991, Mr. Entwistle forbade the builder to come back upon his premises at all and neither it nor any workmen on his behalf have been there since. He went on to say during his cross-examination that there is still evidence of frost damaging the house in the wintertime,

that parts of the house move up and down and that doors bind more noticeably in the winter and that there is a ridge down the middle of the house like a spine. Finally he agreed on cross-examination that the Program had agreed to repair the remaining cracks and waterproof these walls, but he refused because he believed it should replace the whole foundation.

The first witness for the defence was Mr. Tibor Pal, a Consulting Engineer employed by the Program. He prepared two reports, one dated July 8, 1991 found at tab 21 of Exhibit 4 and one dated September 9, 1991 found at tab 24 of Exhibit 4. In the first report, he found the foundation walls plumb and straight, no signs of foundation settlement, the repairs to cracks performing, only minor shrinkage cracks to be seen and the walls and floor dry. He found the basement floor level except for two small areas 1/4" below level and two spots at the north wall 1/2" above level. He did find that the exterior grading and drainage conditions would result in excessive water reaching the drainage tile and recommended certain additional fill, grading, waterproofing and repair of a crack in the west walls. On September 9, he reported on observations made on September 6 when he found no defects in the basement walls, but some rather minor defects in some interior items.

In his evidence to the Tribunal, the main objection he stated was with the grade outside the house which sloped toward the house and with the backfill which was not of a proper material. He said remedying these defects would correct much of the problem. He said he had reviewed Mr. Wilcox's reports and he said it was his view that the damage from frost heaving the footings was caused during the first winter. He said that the cracks in the basement floor were shrinkage and not settlement cracks. He said that the center of the house is supported by a row of posts which would not move so that if the outside walls and foundation moved to any extent, this could result in the binding of the doors and the other things of which the owners complained. While he did not think the foundation still has enough backfill protecting it, he was of the view that with the heat on in the house, it would not get more frost damage.

Mr. Pal said that in his opinion proper grouting of all of the cracks would now seal these walls completely. He said that these cracks do not suggest any defects in workmanship or material or any breach of the Ontario Building Code.

On cross-examination, Mr. Pal said he saw no evidence of movement in the foundation walls and that he did not think it was any foundation movement which caused certain cracking of the

drywall of which the owners were complaining.

The next witness for the Program was Robert Durand, the President of Brockwood Homes. He confirmed that the excavation was 24" deep and that the footings were poured about October 31, 1989 and that the blocks for the wall were put in five to six days later. He said he saw frost heave damage to this wall, he thought in January 1990 - he said the most serious was at the east wall between the house and the garage, but he also saw damage around the other walls. He said the cracking to the wall occurred after the frost went out and the foundation subsided. Mr. Durand said his company carried out the repairs recommended by the engineers. He said that, under the contract it was the owners responsibility to bring in any additional fill required to finish the grade. He said that, when they left the place, the property needed more fill - it still needed 1' to 2' thereof. He concluded his evidence by saying there is no doubt that these footings did heave and raise the wall, that Brockwood did make the necessary repairs and that it is still prepared to go and fix anything required of it, but they had been prevented by the owners from coming upon the property.

The next witness for the Program was Mr. Jack Hussman, who had been 15 years with the Program and is now retired. He said he saw the repairs which were made to the outside of the foundation and the walls. He made a report on November 15, 1990 which is found at tab 10 of Exhibit 4, in the second last paragraph of which he said:

I also told Larry Durand that the cracks in the basement floor looked like the floor had heaved along with the footings. He confirmed that it had, and wondered whether he should fill the cracks. I told him that I did not feel that the cracks should be filled, as they were not wide enough and, if he was to widen the cracks and fill them, the floor would be a mess.

Mr. Hussman visited the site again on July 4, 1991. He found only 1/4" discrepancy in the basement floor level and no change in the cracks and no dampness. On cross-examination, Mr. Hussman said he saw no problem with water on the basement walls. He said the most important thing to be done to remedy the present situation is to correct the grade and bring in more backfill and sloping the grade away from the house.

The next witness for the Program was the Engineer, Mr. V. Wilcox. We have already referred to some of his reports. He said that he saw parts of the footing where the contractor had excavated beneath two of the more prominent cracks. He said these cracks continued down the wall and the footing, but there was no

other damage to the concrete. It was his recommendation just to repair the cracks and not to put more concrete under where the cracks were as this might result in later lateral displacement. Part of the east wall had to be replaced and when this was done, it was as good as new. He said he saw no evidence of the settling of the wall after these repairs were made.

Mr. Wilcox was back a second time about a month later to look at cracks in the basement floor. He saw that the repairs he had recommended the first time had been carried out and he saw cracks in the basement floor which were opening upward which would indicate to him that the concrete was shrinking faster at the top which was in the warm basement than it was doing at the bottom which was on the cold ground. He said these cracks began as shrinkage cracks.

On cross-examination, Mr. Wilcox said the exposed footings were 2' to 2 1/2' in depth and in a snow free area, one would get 4' of frost. He said normally one would backfill perhaps half-way up the wall. He said that any later movement in the foundation, after the initial damage, would be downward and not lateral and that there comes a point when nothing more is going to happen. He said that when he was back the second time, the foundation walls were structurally adequate and as good as if there had not been the frost damage.

The final witness for the Program was George Stinson who had worked as a Manager for the Program throughout the material time. It was he who sent the decision letter of September 11, 1991. He said it was based substantially on Mr. Pal's report found at tab 21 of Exhibit 4 to which we have already referred. He said that he was sure the Program would still be prepared to repair the crack at the centre of the west wall. Mr. Stinson said that he had examined cracks in basement walls many times and that these were shrinkage cracks and in a lengthy wall, there are bound to be some such. He referred in detail to the cracks as shown in a number of the photographs and said that in no case do these constitute a violation of the Ontario Building Code. Mr. Stinson said that the work which the Program had recommended be done was never completed because Mr. Entwistle refused to allow the builder further access to the premises.

On cross-examination, Mr. Stinson repeated that he saw no defects in the walls and further that there are not any abnormal number of shrinkage cracks. He said he saw no evidence of any recent water penetration when he was there. He also said that it would certainly increase the chance of these walls and the basement being free of water if the backfilling were completed properly.

In conclusion, he said that if the two cracks which the Program was prepared to go back and fix were fixed and the whole perimeter of the house properly backfilled and graded, and the caulking checked where any other leaks might appear, he believed the whole problem would be solved.

Upon the foregoing evidence and the facts established, the Tribunal must now come to its conclusions. While there was some evidence concerning other less serious complaints, at the end of the hearing and of the argument on behalf of both parties, we are concerned only with the complaints concerning the footings under the foundation walls, the basement concrete floor and water penetration through these walls and into this basement.

Upon all of the evidence, the Tribunal finds that the structural integrity of the foundation wall and footings now meet the requirements of Section 13(1)(a) of the Ontario New Home Warranties Plan Act which reads:

13.(1) Every vendor of a home warrants to the owner,

(a) that the home

- (i) is constructed in a workmanlike manner and is free from defects in material,
- (ii) is fit for habitation, and
- (iii) is constructed in accordance with the Ontario Building Code;

To do otherwise would be to disregard or reject the evidence of both of the engineers who appeared before us and also the opinions of the two experienced officers of the Program who gave evidence as well. We have no reason to do this and, indeed, believe we have very reason to accept this evidence. Likewise, with regard to the concrete floor in the basement, we have come to the same conclusion for the same reason.

When we come to the problem of water leaks, the situation becomes less open and shut. There is no question that there were water leaks and that something caused the marks and stains shown in the photographs and that this occurred over a very considerable period of time. Different explanations were put forward from each side and it is clear that no remedial work has been done since July 1991. The Applicants have established that

there were warrantable defects in this area, that all of the remedies recommended by the experts to correct them were never completed and, it appears to us on a balance of probabilities that some of the alleged water leaks at later times of which the Applicants brought evidence did and probably still do exist. We have concluded that the Applicants are entitled to have proper steps taken to remedy whatever should be remedied in this regard to bring the house up to the standard warranted in Section 13(1)(a) of the Act.

We have concluded that the most appropriate way of doing this is for the Program to obtain the services of a professional engineer properly qualified in this particular area of expertise, and someone not previously involved with this matter, to attend at the premises and conduct or supervise the conducting of such tests as he or she considers appropriate to determine whether these foundation walls and the basement are sufficiently protected from water penetration as to meet the standards prescribed by the Ontario New Home Warranties Plan Act. The owner, must, of course, permit the engineer and such persons as he wishes to assist him to enter upon the premises for this purpose.

After this is done and the engineer's report received, the Tribunal has concluded that the Program should then have someone attend and properly repair the two cracks which they say they have always been ready to repair and also any other defects identified in the new engineer's report and the owners must, of course, permit this to be done.

With regard to the bringing upon the premises of more material for backfilling and the completion of the grading, the Tribunal finds that, pursuant to the terms of the contract, this is the responsibility of the owners. In his submissions, counsel for the Program urged that any order against the Program should be subject to conditions, one of which he said was that the owners must remedy these defects for which they are responsible. In making its order here, the Tribunal will attach conditions which follow from its findings above, but it does not consider it appropriate to add this condition. After all, this one is completely the responsibility of the owners, failure to carry it out will result only in loss or damage to them and will not concern the Program and, therefore, this should not be a condition of what the Program should be required to do.

Accordingly, by virtue of the authority vested in it by Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program as follows:

- (1) To retain a professional engineer properly qualified in this particular area of expertise and being someone not previously involved with this matter to attend at the premises, and conduct or supervise the conducting of such tests as he or she considers appropriate to determine whether these foundation walls and the basement are sufficiently protected from water penetration as to meet the standards prescribed by the Ontario New Home Warranties Plan Act;
- (2) After the engineer's report is received, the Program should have proper repairs made to the two cracks which they have already indicated they are ready to repair and to any other defects identified in the report to bring all of the same up to the standard provided in the Act;
- (3) It is a condition of the foregoing that the Applicants must allow access at reasonable times to the premises of the persons required to carry out the first and second items of this Order and, if they refuse to do so, the Tribunal directs that the Program shall have no further obligations to the Applicants herein;
- (4) Apart from the foregoing, the Tribunal directs the Ontario New Home Warranty Program to disallow the Applicants' claims.

TONY FERRARI

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding

APPEARANCES:

TONY FERRARI, appearing on his own behalf

BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 11 July 1994

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal by the Applicant from a decision of the Ontario New Home Warranty Program set out in its letter to the Applicant dated November 29, 1993. The facts are somewhat unusual.

The Applicant is a registered real estate agent and has been so for some 24 years. In the early part of 1987, Mr. Ferrari had sold a piece of land in Mississauga to a builder, Pugliese Development for 5.3 million dollars for which he was to receive \$80,000 commission from the developer. A Plan of Subdivision had been prepared and filed with the municipality, but a delay was encountered in getting it approved because some form of contamination was found upon the land and certain steps had to be undertaken to remove this before the municipality would give its approval to the plan. The builder commenced this work, but in the meantime wished to get as many as possible of the houses he proposed to build (the Plan provided for 40 or a few over) presold. The municipality has a regulation that no sales trailer or, I understand, other form of advertising can be placed upon lands for which a Plan of Subdivision has not yet been approved. However, it so happened that the Applicant had his real estate office right across the road from this property and there was no rule against his operating from there to sell these homes.

Accordingly, Pugliese Development entered into an arrangement with Mr. Ferrari to presell these homes for it. The selling prices were \$185,000 and some, with extras, a little more. Mr. Ferrari was to get \$1,500 commission for each house sold. By March 1987, he had sold 30 of them for a total commission of \$45,000. Already that year, he had coming to him the \$80,000

aforementioned and \$50,000 in commissions on other transactions not connected with this property at all and there were still nine months to go in which he expected to become entitled to additional income. He was concerned about the amount of income tax he was going to have to pay. With this in mind, Mr. Ferrari went to Mr. Pugliese and asked him if he would agree to a deal whereby he, Mr. Ferrari, would forego his right to the \$45,000 in commissions and Mr. Pugliese would, in turn, sell him three finished houses in the subdivision for \$170,000 each, a discount of 3 x \$15,000 or \$45,000.

Mr. Pugliese agreed to do this and on March 12, 1987, three Offers of Purchase and Sale were signed for lots 11, 13 and 14 on the west side of Silver Birch Trail in the proposed subdivision. All three offers were drawn on the forms which Mr. Ferrari had been using to sell the other 30 houses to Third Partys. In each case, the purchase price is \$170,000 and a deposit of \$20,000 is required upon the signing of the agreement. Mr. Ferrari said that Mr. Pugliese asked him to pay him these deposit sums totalling \$60,000 in cash and he agreed to do so, but said he needed a little time to get this together. Mr. Ferrari said he borrowed \$40,000 from his father-in-law who had brought it in lira from Italy and converted it here and gave this to Pugliese on March 17, 1987 and a couple of day's later, he said he got the other \$20,000 and gave him that.

Mr. Ferrari did not get any receipt from Pugliese for any of this money and he produced no corroboration of any kind for any part of the transaction involved, except the copies of the Offer which provided for the deposits. One must also wonder what was in the mind of an experienced real estate agent, who knew the requirements of the Real Estate and Business Brokers Act with regard to the placing of deposits in trust until the closing or other disposition of the transaction, when he was doing all this.

Two comments should be added when dealing with this point. On the one hand, Mr. Ferrari was not acting as an agent in these transactions, he was the principal as purchaser and so the duties imposed by the Act upon agents in this regard did not apply. On the other hand, Mr. Ferrari gave evidence that the deposits for the 30 sales he made to Third Partys went to Pugliese (and not into trust) and when the whole project fell through, these people got their money back from the Program, presumably 30 x \$20,000 or \$600,000, a not inconsiderable sum.

No witness gave evidence at the hearing from the Program and no confirmation of any of these facts were provided from it and, indeed, none of these issues concerning any of these deposits are of direct concern in this hearing. I believe that a review of this evidence is, however, of some assistance in assessing the kind

of transactions with which we are dealing and the credibility which should be given to the uncorroborated oral evidence of the Applicant that he, in fact, paid the \$60,000 to Mr. Pugliese.

Another issue arose as to the intentions of the Applicant when he bought these three houses to be built and his purpose in doing so. On this question, he said that at the time he entered into these Offers, his only formed intention for doing so was to save the income tax which he would otherwise have to pay. He said that, at that time, he had formed no further intention as to what he would do with the houses, but simply was going to see what happened. Subsequently, after the market had risen considerably, he formed the intention of giving one of the houses to his brother-in-law to allow him to recover a financial loss he had incurred earlier in some transaction which he, the Applicant, had induced him to enter. And he talked about some ideas he had about some deals with regard to the second house with his father-in-law, but he gave no other evidence of intention with regard any of these houses to be built. He freely admitted that he never formed an intention to live in one or more of these houses and he certainly had no such intention at the time he signed the Offer.

In the result, because of the delay in getting the subdivision approved and the great rise in the market in the interval the builder, Pugliese Development, was put in a position where it could not profitably go on with the whole transaction and accordingly, the transaction to purchase the whole property for 5.3 million and all of the sales of the houses to be built fell through and, apparently all deposits were lost.

There is an additional matter of fact to which reference should be made because the Applicant relied upon it both in his evidence and in his argument. He said that just about when he had all of the sales with which he was involved in place (some 33 including his own) another agent came to Pugliese and sought, on behalf of a purchaser whom he represented to buy 10 of the houses (being all or almost all remaining). This was an investor and not someone buying for occupancy. Mr. Ferrari said that a \$20,000 deposit was paid on each of these for a total of \$200,000 and that Pugliese got this money.

It somewhat strains credulity to believe that a second agent would be party to the same breach of the Real Estate and Business Brokers Act as the Applicant and perhaps his broker (if the broker knew about it). It was Mr. Ferrari's evidence that this investor got his \$200,000 back from the Program and he pointed out that it certainly did not buy for occupancy. There was a suggestion that this claim had come before the Tribunal. However, there was no confirmation of any of this from the Program and no corroboration of any of it produced by the Applicant. I refer to

this matter for two reasons. First because the Applicant relied upon this in argument to say that if these people got their deposit back from the Program so should he and secondly, to comment that it appears probable that there is something wrong with the Applicant's evidence on this particular matter.

No evidence was called on behalf of the Program and Counsel relied in argument upon two defences:

1. The Applicant did not discharge the burden of proof upon him that he paid the \$60,000 in deposits.

2. The Applicant was never an "owner" of these properties within the definition found in section 1 of the Act; "'owner' means a person who first acquires a home from its vendor for occupancy, and the person's successors in title."

On the first point, I must find that the Applicant did not prove on a balance of probabilities on the evidence that he paid the \$60,000 to Pugliese. He brought nothing but his own uncorroborated testimony in support of this allegation. The sum in issue is substantial and one would have thought that an experienced businessman would have turned his mind to where some corroboration could be found. If any of the money passed through any bank account or financial institution, records of the same should be available.

No explanation was given as to why Mr. Pugliese was not called to verify that he got the money. When asked why he did not get a receipt, Mr. Ferrari said he did not think he needed one as the signed Offers provided the same. Of course, they do not. They simply set out the requirement for the deposits, they give no indication as to whether or not it was paid. An inexperienced lay person might make this mistake. A real estate agent registered over 24 years would not.

Also, as aforementioned, there is definitely something wrong with the Applicant's evidence with regard to the \$200,000 deposit on the 10 lots sold to the investor and there are quite a number of unanswered questions with regard to the \$600,000 in deposits said to have been recovered from the Program for the 30 houses the Applicant sold to Third Partys. Taking all of this into account, I am unable to find that the Applicant paid the sum of \$60,000 claimed herein, or any part of it, to Mr. Pugliese as stated and the Applicant's claim must fail for that reason. Having come to this conclusion, I do not have to deal with the second defence raised by the Program.

Therefore, by virtue of the authority vested in it by section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

FERRARO, PASQUALE P.

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: THERESA M. WALSH, Vice-Chair, Presiding
SUSAN TANNER, Vice-Chair as Member
WILLIAM WATSON, Member

APPEARANCES:

PASQUALE P. FERRARO, on his own behalf

RICHARD CARTY, counsel, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 16 November 1993

Ottawa

REASONS FOR DECISION AND ORDER

Mr. Pasquale Ferraro appeals a decision by the Ontario New Home Warranty Program to deny him compensation for a faulty septic system. By letter dated November 17, 1992, the Program denied that this constituted a major structural defect.

A preliminary issue is whether this claim is to be regarded as one based upon a major structural defect or a breach of a first-year warranty. The starting point is the Certificate of Possession, which is dated October 30, 1989.

The Program's representative, Ms. Heather Mayhew, testified that the Program first received written notice of Mr. Ferraro's problems with the septic system in a Proof of Claim dated August 19, 1992. It is accepted that the Program first received, as a supporting document to the August 1992 Proof of Claim, a copy of a letter dated November 15, 1990 from the Ministry of the Environment noting septic system problems.

Mr. Ferraro does not dispute that it was not until 1992 that he brought the matter to the attention of the Program.

Based upon this evidence, the Tribunal makes a preliminary finding that the Program did not receive written notice of the alleged defect until well outside the first-year warranty period. Thus, Mr. Ferraro's claim must constitute a "major structural defect", as defined, in order to be eligible for compensation.

The definition of "major structural defect", as set out in section 1 of Regulation 892 to the Ontario New Home Warranties Plan Act (the "Act"), requires that the faulty septic system be the result of a defect in work or materials. This defect must either materially affect the load-bearing function of the home, or materially and adversely affect the use of the home for the purpose for which it was intended.

According to Mr. Ferraro, the septic system problems first became apparent in the spring of 1990 when he noticed pooling in his backyard and the "stench of raw sewage". Mr. Ferraro denied excessive water usage at his home. He stated that he advised his builder of the septic system problem.

On October 19, 1990, the Ministry of the Environment inspected Mr. Ferraro's property and addressed its response to Mr. Ferraro's builder. Mr. R. Doyle, Senior Environmental Officer, testified that upon inspection he found the tile bed to be extremely saturated. By letter dated November 15, 1990, Mr. Doyle stated that the saturated tile bed was "not capable of dispersing into the ground the volume of sewage generated at the house". He recommended either constructing a second tile bed to disperse the flow over a greater area or retaining a consultant.

Mr. Ferraro testified that he did not receive a copy of this letter until the summer of 1991. These recommendations by the Ministry of the Environment were never implemented.

In their stead, the builder attempted some remedial work in the summer of 1991. According to the testimony of the Program's representative, this remedial work was a "good will gesture" by the builder and not indicative of the Program's finding that the builder was liable for the septic system repair.

Mr. Filion, who originally installed the septic system on behalf of the builder, testified that in the summer of 1991 he dug below the tile bed. He found a broken pipe and replaced it. He also installed more gravel.

Mr. Filion also testified that he originally installed an additional 2 runs to increase the capacity of the system because Mr. Ferraro intended to occupy the home with his family of five. He noted that the plan submitted to the Ministry of the Environment for approval called for only 6 runs in total.

According to Mr. Ferraro, this remedial work by Mr. Filion did not remedy the pooling but simply shifted it to a different location in the backyard. In the summer of 1992, Mr. Ferraro had the septic system cleaned, which also did not remedy the problem.

By October 1992, the Program had performed an inspection. Heather Mayhew testified on behalf of the Program that she observed no pooling or sewage odour on the date of inspection. Under cross-examination, she agreed that the septic system is not apparently operating properly.

Mr. Ferraro testified that as a result of the faulty septic system his family has been forced to tolerate the pooling and sewage odour for 4 summers.

It is clear that the burden of proof is upon the Applicant here to demonstrate the existence of a major structural defect. We adopt the statement to the same effect found in the Feroze case, heard by this Tribunal on July 26, 1990, to which counsel for the Program referred us.

The Program argued that the Applicant was not eligible for compensation on a two-pronged basis:

- 1) the faulty septic system did not constitute a major structural defect because no defect in work or materials existed and further, Mr. Ferraro's home was not rendered unfit for habitation as a result;
- 2) in the alternative, Mr. Ferraro's claim was excluded under section 13(2)(g) because of conduct on the part of the owner.

Upon a review of all the evidence, this Tribunal finds that the Applicant has not discharged the burden of proof upon him to persuade this Tribunal of the existence of a major structural defect that is the result of a defect in work or materials.

On the contrary, we accept the uncontradicted evidence of Mr. R. Doyle, the Senior Environmental Officer, who inspected the Ferraro property and drafted the response of the Ministry of the Environment in a letter dated November 15, 1990.

Mr. Doyle testified that in his view the septic system problems were not caused by a defect in work or materials in the septic system. He relied upon the fact that the design, workmanship and type of fill to be used had been approved as required by the Ministry of the Environment in its Certificate of Approval dated March 22, 1992. The Ministry of the Environment further approved the system during its on-site inspection before the backfilling was done by the septic system installer over the septic tank and tile bed. In Mr. Doyle's words, there was "nothing wrong" septic system, which he also noted had an increased capacity of 8 runs.

This evidence supports the Program's assertion that no defect in work or materials caused the alleged major structural defect in the septic system.

Additionally, this Tribunal finds upon the Applicant's own evidence that his use of his home as a home was not materially or adversely affected by the faulty septic system. He admits that he has occupied the home with his family since October 1989. From May 1992 until October 1993, Mr. Ferraro stated that his parents also resided with him. The Applicant admitted that his home is fit for habitation although he contends that the grounds are not fit for use during the summer months.

Given that this Tribunal accepts that the faulty septic system was not the result of a defect in work or materials, it is not necessary to review in detail the evidence presented as to the possible causes of the malfunction.

However, the Tribunal found persuasive the evidence of the representative of the Ministry of the Environment, Mr. Doyle as to the possible cause of the malfunction. He testified that during his nearly 25 years experience with the Ministry of the Environment he has observed that septic system failure most often results from the soil conditions. In his view, if the soil cannot accept the amount of sewage generated at the home, that soil will "fill up like a bathtub". This bathtub effect would be enhanced if the soil around the system was not very permeable. Once the coarse gravel fill, which is approved by the Ministry and installed under the tile bed, fills up, the liquid will seek the path of least resistance.

In the opinion of Mr. Doyle, there was evidence that the soil around the system was not very permeable. He referred to the Certificate of Approval for the sewage system, which states that the sub-surface soil conditions encountered on the Ferraro property consisted of "very fine sand", which is common to the area. He noted that the test hole, which he dug during the October 1990 inspection, was only 15 feet away from the saturated tile bed, yet no water entered the hole at a 3-foot depth. This suggested to Mr. Doyle that this very fine sand was not very permeable.

There was also evidence of possible excessive water use by the Ferraro household, thereby straining the capacity of a system that already had been increased by the builder on a good will basis.

Towards this, we note the testimony of the manager of customer water accounts for the Region, Ms. Carol Manning, as to the annual water usage of the Ferraro family. She stated that her review of the water accounts showed the Ferraro household to have

the highest water consumption among the 23 homes on the same street. According to Ms. Manning, the Ferraro household consumed about twice as much water annually as that used by both the street residents and overall for residential regional accounts.

There was further conflicting evidence that the Applicant may have contributed by his own conduct to the defective system. This was alleged to have occurred by the Applicant installing a skating rink for his children over the tile bed in January 1990 and, later in 1991, positioning cedars improperly around his swimming pool.

Nevertheless, we find sufficient the evidence presented that no defect in work or materials has resulted in a major structural defect with the septic system. Thus, the Applicant's claim does not fall within the Act and, as a result, no compensation is payable.

Therefore, by virtue of the authority vested in it by section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal upholds the decision of the Ontario New Home Warranties Program to deny the Applicant's claim for compensation relating to the septic system.

MIRA S. FOURNIER

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JUDITH A. KILLORAN, Chair, presiding
SELWYN CHARLES, Member
LOUIS A. RICE, Member

APPEARANCES:

LLOYD FOURNIER, appearing as agent for the
Applicant
BRIAN CAMPBELL, representing the Ontario New
Home Warranty Program

DATE OF

HEARING: 3 October 1994

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program dated September 17, 1993. The Applicant sought the return of her deposit and money paid for upgraded carpeting, which totalled \$17,593.75. This claim related to the failure of a transaction to close involving the purchase and sale of a house on Lot 32, Delaney Street in Barrie. The Applicant's claim was disallowed under section 14(1)(a) of the Act on the grounds that the transaction failed to close solely because the Applicant was not prepared to close and the Applicant did not suffer any damages as a result of the Vendor's actions.

Mr. Fournier, agent for the Applicant, testified that the Agreement of Purchase and Sale signed by the Applicant was based on a December 3, 1990 closing. This closing was moved to November 9, 1990 by the Vendor. On that date, the Vendor tendered on the Applicant who refused to close. According to Mr. Fournier, her reason for not closing was that the property in question had liens attached.

The Applicant's agent submitted in evidence an abstract detailing the liens and a letter dated November 9, 1990 from the Applicant's lawyer noting the imperfections in the tendering process. The Applicant filed a Statement of Claim on November 22, 1990 seeking damages from the Vendor for the aborted closing and a Certificate of Pending Litigation was registered against the property. Judgement in favour of the Applicant was awarded on September 25, 1991 and a writ of seizure was obtained on October 9, 1991.

On cross-examination, the Applicant's agent was questioned about a memorandum dated August 8, 1990 from the Applicant to the Vendor (Exhibit 21, Tab 2). In this memorandum, the Applicant stated that the house was bought as a residence for her mother who had decided she no longer wished to move to Barrie. The Applicant stated that she would not be able to take possession of the house due to inadequate finances. Finally, she requested that the Vendor resell the house and insisted that she could not afford to lose her deposit.

A second memorandum dated September 10, 1990 from the Applicant to the Vendor stated that there was no way that the Applicant could handle the mortgage payments and a request was made for assistance in resolving the situation.

Despite these two memorandums, the Applicant's agent claimed that the Applicant had the funds available to close. However, he could produce no evidence that the funds were so available and the Applicant did not tender the funds to the Vendor on November 9, 1990. As well, there was no letter of requisition prior to November 9, 1990 demanding the removal of any liens on the property.

On February 20, 1991, Arthur Anderson Inc. was appointed as a trustee to act as receiver and manager of the assets of the Vendor and ordered to complete all agreements of purchase and sale. As well, an interim injunction was granted forbidding the commencement or continuation of any proceedings without leave with respect to the properties listed in an attached schedule, one of which was the property in question.

On June 11, 1991, the law firm of Morris and Morris, which represented Arthur Anderson Inc., forwarded a letter to Markowitz and Associates, the law firm representing the Applicant. The Applicant was informed that the trustee would consent to a judgment for specific performance or alternatively, would consent to the lifting of the Certificate of Pending Litigation and close with a third party. The Applicant's agent claimed that the Applicant relied on that portion of the letter which stated that the Ontario New Home Warranties Program would reimburse deposits up to \$20,000.

However, the letter further advised that the Applicant contact the Program and confirm that the above was correct. At the same time, it should be kept in mind that these statements about the return of the deposit were not made by the Applicant's solicitor but by opposing counsel. It is not reasonable for the Applicant's agent to argue that the Applicant relied on this letter to her detriment.

A letter dated June 19, 1991 from Morris and Morris to Markowitz and Associates confirmed that the Applicant's claim for specific performance would be abandoned and the Certificate of Pending Litigation lifted. However, the Applicant proceeded with her claim against the Vendor.

Mr. James Whitfield, an employee of Arthur Anderson and Company, testified that he was informed that the Applicant was not prepared to close the transaction for the purchase of the property in question. As a consequence, the trustee subsequently closed with another purchaser.

The Tribunal considers it regrettable that the Applicant did not attend the hearing and was not available to give her testimony. Based on the testimony of her agent and the documentary evidence, the Tribunal finds no merit to the argument that the tendering on November 9, 1990 was imperfect. Any liens on the property in question had not been removed because the Vendor had been informed on at least two occasions prior to the proposed closing that the Applicant was not able to close. This is borne out by the fact the Applicant's lawyer made no searches or sub-searches of the property and forwarded no requisition letter demanding the removal of the liens prior to the proposed closing.

Not only did the Applicant fail to close on November 9, 1990, but she also declined again to close when approached by the trustee in February of 1991 with a proposed closing of June 8, 1991. The Tribunal finds that the Applicant was in breach of the Agreement of Purchase and Sale with her refusal to close on two separate occasions. The judgment obtained by the Applicant was in error because a previous court order prevented any proceedings against the original vendor from continuing without leave. As well, the Tribunal notes that the action against the Vendor was undefended and the judgment awarded was not as a result of a trial on the issues.

The Applicant can not succeed in her claim under section 14(1)(a) of the Act because she has failed to establish the requisite elements for compensation. The Applicant has no cause of action in damages because she has not suffered a financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract. Rather, it was the Applicant who was in breach of the contract.

Accordingly, by virtue of the authority vested in it under section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal upholds the decision of the Ontario New Home Warranty Program to disallow the claim of the Applicant.

KEITH GILBERT

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding
GERRY BEECH, Member
JOHN HURLBURT, Member

APPEARANCES:

KEITH GILBERT, appearing on his own behalf

BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

DATE OF
HEARING:

1 December 1993

Toronto

REASONS FOR DECISION AND ORDER

This an appeal from the judgement of the Ontario New Home Warranty Program dated June 1, 1993 in which the Program offered to pay the Applicant \$850.00 as compensation for all his claims against the builder, 767986 Ontario Inc. The Applicant believes that the amount offered is inadequate.

The Applicant presented six items of claim against the Program, as follows:

1. That the Program put down gravel and backfill an area at the base of the poured concrete wall, south side, where the chimney juts out from the concrete wall.

2. That the roof or tiles be reinstalled below the window on the west wall and that gravel be placed over the tiles. In addition, the Applicant asked for compensation for work improperly executed to correct the problem with water penetration on the west wall. The improper work resulted in damages.

3. With respect to the cold cellar, the Applicant complains of dampness and asks that the Program carry out the repairs necessary including adding a second line to the sump pump.

4. With respect to the wall, common to the house and the garage, the Applicant complains of leakage and asks that the wall be repaired by the Program.

5. The Applicant claims \$5,100 from the Program to cover amounts already paid for final grading of the property, as well as sums to be paid to finish the grading.

6. The Applicant claims \$1,789.70 from the Program to complete work that he alleges should have been completed by the builder.

During the hearing the parties agreed that items 5 and 6 should not be decided by this Tribunal, but that the Applicant's rights against the Program be reserved by the judgement to intervene. The parties agreed that Mr. Gilbert would then make a new claim for items 5 and 6, await a judgement of the New Home Warranty Program, after which he could either accept the judgement or appeal it to this Tribunal. The reason items 5 and 6 could not be heard was that the Applicant had failed to make a formal demand to the Program for payment and to produce the evidence necessary to allow the Program to make its decision. Since no decision has been rendered by the New Home Warranty Program, there is no matter for appeal before this Tribunal.

That leaves items 1 to 4 to be decided today. These items relate to leaking through basement walls during heavy rains or mild spells in winter. The Tribunal will deal with each of the items in the order they were presented.

The Applicant testified that he entered into a contract for the construction of the home for a salesprice of \$140,000.

He filled out a Certificate of Completion and Possession alone because the builder refused to fill it in. It was eventually sent to the New Home Warranty Program and constitutes the basis for the Applicant's claims against the Fund.

The Program stated that the complaints were made within the time period prescribed by the Act.

1. Claim for Program to provide gravel and backfill the chimney area

Mr. Gilbert testified that a hole was left in the area of the chimney where repairs had been carried out and required refilling. He also felt that gravel should be put in on top of the roofing tiles before the backfilling was done.

The Program as well as Mr. Felker, a contractor hired by the New Home Warranty Program to carry out certain repairs which the builder had failed to do, both admitted that no backfill had been put in.

In its judgement, the Program had provided that the \$850.00 offered also covered filling in the hole.

The Tribunal finds that this area should have been backfilled long ago. Without providing any quotations of their own, the Program has taken the position that the area can be filled for \$50 and offers that as compensation within the \$250 set up for landscaping. Other than that, the Program has really left the Applicant on his own and has not been attentive to his legitimate needs. As a result, the Applicant has had to put up with a hole in that area for over one year.

The Tribunal orders the Program to backfill the site and to sod it thereafter.

Item 2 - West wall

Mr. Gilbert stated that he wanted the Program to put gravel on the roof or tiles in the area bordering on the west wall and that the position of the roof or tiles be corrected. Once this was carried out, he asked that the Program do all landscaping to render the site to its original appearance.

Mr. Gilbert testified that the builder had been put on notice on numerous occasions to correct certain problems with water penetration. He consistently refused to do so and as a result, a contractor named Inside-Outside Waterproofers, selected by the Program was engaged to carry out this work.

In the course of carrying out its work, Inside-Outside Waterproofers severed certain drainage lines. As a result, there was serious flooding which resulted in \$598.99 in damages, being the amount paid by the Applicant to repair the pump and the piping.

According to the testimony of Mr. Gilbert, he informed Inside-Outside Waterproofers immediately of the flooding, but they did nothing to correct it. He was, therefore, obliged to do so himself as quickly as possible in order to prevent what could have been very serious damages.

He testified that there remained a further amount of \$484.54 to pay to restore the grounds to their former condition.

Mr. Gilbert further testified that the contractor carried out other work required, including installing a membrane on the west wall. He complained, however, that the contractor failed to carry out certain repairs properly and did not put any gravel on the roof or tiles; the roof or tiles themselves were installed at a level which was above the footing of the building.

In cross-examination, Mr. Gilbert stated that there was no leaking of any sort in the west wall. In reply to certain questions of the Tribunal, Mr. Gilbert testified that not only had no leaks occurred, but that there was nothing to indicate that any leaks were developing. His complaint was simply based on the fact that the process used by the contractor in installing the roofing tile did not meet Building Code requirements.

Mr. Ken Graham testified that he was on the site October 13 for the backfilling of the excavations and that he saw for himself that no gravel was used with respect to the west wall.

Mr. Fortune of the Program testified that because there is no water penetration on the west wall, the Program rejected Mr. Gilbert's claim.

With respect to the \$598.99 which Mr. Gilbert paid as the result of the flooding, Mr. Fortune withdrew the Program's offer to pay \$600 and stated that the amount paid by Mr. Gilbert constituted secondary damages which would not be covered by the Ontario New Home Warranties Plan Act.

Mr. Fortune, however, admitted that it was the Program which had engaged the contractor to do the work and that the damages which Mr. Gilbert suffered came as a result of the contractor's fault or negligence.

Mr. Felker of Inside/Outside stated that the weeping tiles must have been correctly installed because after a number of years in which there was a great deal of rainy weather, no leaks had developed.

Mr. Felker also admitted that his company had caused damages while carrying out the repairs because of severing the drain lines. He went on to testify that he had spoken to the Program at the same time as the damages had occurred to see what should be done, but got no specific instructions from them. He went on to state that a representative of the Program told him that Mr. Gilbert should do whatever was necessary to repair the damages. Mr. Felker himself could not do it because he was on another job. Mr. Felker left it to the Program to handle the matter.

The Tribunal notes that at one point Mr. Fortune claimed that Mr. Gilbert had carried out the repairs without giving the Program a chance to verify or do them on their own. He implied that the Program had received no notification of the flooding. This was completely contradicted by Mr. Felker's testimony as well as by a letter written by Mr. Gilbert on December 1, 1992 and received by the Program on December 8, 1992, filed in Exhibit 4 as tab 28. Both Mr. Gilbert in his letter and Mr. Felker speak of a

Mr. Stan Silver with the Program who was fully advised of what had occurred and of what Mr. Gilbert intended to do. This was undoubtedly why the Program was prepared, at first, to pay the \$600.

In addition, with respect to the landscaping costs to restore the grounds, it is to be noted that Mr. Gilbert provided three estimates of which the estimate for \$484.54 was the lowest. While Mr. Fortune finds that estimate excessive, the Program did not produce any estimate of its own.

The Tribunal finds with respect to his claim that the Program reinstall the weeper tiles and put gravel on top of them, that Mr. Gilbert has not proved that the work was deficient. All the evidence clearly demonstrates that despite very rainy weather in the last number of years, there has been no sign of leaking or even of the development of leaking. While Mr. Gilbert apprehends a leak may develop because of what he considers to be deficiencies in the way the weeping tiles were installed, the proof is that there is no problem. Mr. Gilbert has, therefore, failed to prove his claim.

With respect to the \$598.99 claimed as damages, the Tribunal orders the Program to pay them to Mr. Gilbert. The Program is responsible for the fault and negligence of Inside/Outside Waterproofers since the Program itself contracted their services. The amount spent by Mr. Gilbert is clearly itemized and appears reasonable. It is also clear that in having the work done quickly, Mr. Gilbert mitigated any claim which he might have had against the Program. Had he waited, his claim against the Program would have been many times greater. It was therefore to everyone's benefit that the repairs were rapidly carried out. It also appears that the Fund was kept fully aware of both the problem when it occurred and the course that Mr. Gilbert was taking to correct it.

As to the \$484.54 for the landscaping required, this claim is based on the lowest of three estimates. In the absence of any proof by the Program, outside of the opinion of Mr. Fortune that the cost of this work is excessive, the Tribunal upholds Mr. Gilbert's claim. It is the view of the Tribunal that the amount asked is reasonable in the circumstances. The Tribunal, therefore, orders the Program to pay to Mr. Gilbert the sum of \$484.54.

Item 3 - The Cold Cellar

Mr. Gilbert testified that the walls in the cold cellar were damp because the sump pump was not properly hooked up. He stated that a second line should be hooked up to the sump pump to draw away water.

Mr. Fortune testified that he saw no signs of water penetration problems in the cold cellar.

Mr. Felker testified that he saw no water penetration in the area and that the dampness was the result of condensation.

He also stated that Mr. Gilbert had no reason to ask for a second line to a sump pump since other houses in the area had sump pumps such as his with only one line.

The Tribunal finds that the burden of proof in establishing the cause of the dampness is on Mr. Gilbert and that he has failed to discharge this burden. As a result, the Tribunal rejects his claim with respect to the cold cellar.

Item 4 - Leakage on the Wall common to the house and the garage

Mr. Gilbert testified that despite certain repairs carried out on the common wall, there continued to be leakage. He presented photographs to the Tribunal which clearly show there is a puddling and wetness near the walls and on the wall. This occurs at times of heavy rains or water runoff. In cross-examination, Mr. Gilbert stated that the Program had seen leaks in the wall and undertaken to repair them.

Mr. Fortune stated that he saw no leaks at the time he visited. Mr. Felker also stated that he saw no problems with respect to the common wall.

On the balance of the proof presented, the Tribunal finds that Mr. Gilbert has established that water penetration is occurring on the wall common to the house and the garage and that the problem has not been properly repaired. Mr. Felker and Mr. Fortune only went once to observe the problem, whereas Mr. Gilbert has been living in the premises and been able to see when it occurred. His photographs, as well, clearly establish the veracity of his testimony.

The Tribunal therefore orders the Program to carry out the repairs necessary to correct the leakage in the wall common to the house and the garage.

Conclusion:

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to do the following with regard to Items 1 to 4:

Item 1 - to backfill the chimney area and to sod it thereafter;

Item 2 - to pay the owner \$598.99 as damages and a further sum of \$484.54 for the landscaping required;

Item 3 - to disallow this claim; and

Item 4 - to allow this claim and carry out the repairs necessary to correct the leakage in the wall common to the house and the garage;

and that the rights of the Applicant against the Program be reserved to make a claim for Items 5 and 6.

ALAIN GODIN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JUDITH A. KILLORAN, Chair, presiding

APPEARANCES:

ALAIN GODIN, appearing on his own behalf

DAVID SHERRIFF-SCOTT, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 26 August 1994

Ottawa

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program dated July 14, 1993. The decision disallowed the Applicant's claim for repairs to the tiled ceramic floor in his vestibule which extends to the kitchen and family room.

The three issues in dispute are the following:

- 1) Did the Applicant comply with the first-year notice requirement under the Act?
- 2) Did the Applicant comply with the Program's policy requiring the Applicant to complain about any repairs done under warranty within one year of the date of the repairs?
- 3) Does the Applicant's vestibule floor meet the standards required by the Act?

Did the Applicant comply with the first-year notice requirement under the Act?

The Applicant's date of possession was on March 29, 1990 as specified in his Warranty Certificate. The applicable warranty period extends one year from the date of possession since the alleged defect is not a major structural defect. Therefore, the one-year warranty period under section 13(4) of the Act expired at midnight on March 28, 1991.

The Applicant sent a registered letter of complaint to the Program on March 26, 1991 but the Program did not receive the

letter until April 2, 1991 as evidenced by a date receipt stamp. As determined in previous Tribunal cases, the date of receipt of the complaint is the critical date and not the date of the posting of the complaint. Those cases relied on are: J. Robitaille (1983) 12 CRAT 201, Singh (1981) 10 CRAT 113, and Carleton Condominium Corporation 445 (1991) 22 CRAT 582.

The Tribunal finds that the Applicant did not comply with the notice requirement for first-year warranty protection.

Did the Applicant comply with the Program's policy requiring the Applicant to complain about repairs done under warranty within one year of the date of such repairs?

As noted earlier, the warranties under section 13 of the Act are only available to a homeowner who provides notice to the Program within one year from the date of possession. The policy of the Program requires the Applicant to complain about repairs done under the warranty provision within one year from the date of the remedial work. CRAT has upheld that policy in the following cases: A. Talosi (1991) 22 CRAT 950, Rod Senior released October 23, 1992 and Edgar Cowie released December 10, 1992.

A representative of the builder testified that all remedial work arising from the Applicant's complaint was completed not later than February 18, 1992, as evidenced by a work order filed as Exhibit 11. The Applicant did not make an additional complaint about the remedial work until March 1, 1993. The Tribunal finds that the Applicant did not comply with the one-year notice requirement for complaints related to remedial work.

Does the Applicant's vestibule floor meet the standards required by the Act?

The Applicant testified about his dissatisfaction with the unevenness of the ceramic floor in his vestibule. As well, he entered photographs which did document a certain amount of unevenness in the floor. However, he did not measure the deflection, unlike the representative for the Program, Mr. Rochon.

Mr. Rochon testified that he was on his hands and knees examining the floor and measuring for deflection with a level. He did not discover any deflection which exceeded 1/4 inch over a 4 foot area. This is the standard recognized by the industry and the Program as being acceptable.

Mr. McGovern, an architectural technologist employed by the builder, accompanied Mr. Rochon during his inspection of the floor on May 18, 1993. He confirmed that any deflection observed was not of such magnitude to cause concern. Both Mr. Rochon and

Mr. McGovern attributed any deflection to shrinkage of materials, which is excluded from warranty under section 13(2)(d) of the Act.

Although the Tribunal was sympathetic to the Applicant's concern about his ceramic floor, the Tribunal finds that the evidence supports a conclusion that the floor meets the standards set by the Act. The photographs entered in evidence by the Applicant were of assistance to the Tribunal but were not sufficient to refute the testimony of the Program witnesses.

Accordingly, by virtue of the authority vested in it under section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal upholds the decision of the Ontario New Home Warranty Program to disallow the claim of the Applicant.

GORRA, MR. AND MRS. KELLY

APPEAL FROM A DECISION OF THE
CORPORATION DESIGNATED
FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: THERESA M. WALSH, Vice-Chair

APPEARANCES:

JAMES L. MACGILLIVRAY, counsel
representing the Applicants

DAVID SHERRIFF-SCOTT, counsel
representing the Ontario New Home Warranty Program

DATES OF 17 November 1993

HEARING: 24 March 1994

Ottawa

REASONS FOR DECISION AND ORDER

Mr. Kelly Gorra and his wife, Mrs. Kelli Gorra, appeal a decision by the Ontario New Home Warranty Program under the Ontario New Home Warranties Plan Act (the "Act"), denying them compensation, principally for water penetration into the basement of their home.

In its decision letter, dated April 23, 1992, the Program found that the Applicants were not entitled to compensation for several reasons:

- 1) the Applicants do not have a cause of action against their vendor/builder for breach of warranty, as required under section 14(1)(b) of the Act, because they failed to comply with a term of the Agreement of Purchase and Sale. Under this Agreement, the Purchasers were to obtain engineering certificates for soil tests that in the view of the Program would have prevented these damages from occurring;
- 2) the Applicants refused reasonable access to the builder to do repairs. The builder is now out of business and thus cannot perform the repairs;
- 3) the Applicants have refused to allow the Program to use the method of repair that it has determined is

reasonable. The Applicants, in turn, have asserted a right to choose the method of repair; and

- 4) the Applicants continue to owe money to the builder, which must be offset against any compensation payable to them.

The facts are that in August 1989, the Gorras viewed a lot with their acquaintance, Mr. Johannes Van Der Ploeg, who was also the president of their builder, Vanthom Builders Ltd. Mr. Gorra testified that the lot was wooded and only partially cleared and that he noticed that the ground was wet.

Nevertheless, the Gorras decided to enter into an Agreement of Purchase and Sale, dated August 14, 1989, under which they agreed to purchase the lot from Vanthom Builders, who were to construct a home upon the lot, for the price of \$97,800. According to clause 1(c) of the Agreement, Vanthom Builders was to "commence work after obtaining the required permits from the proper authorities to build" between August 19 - September 14, 1989, and to substantially complete the construction in about 4 months.

Under section 10(e) of the Agreement, the Gorras agreed to do the following:

The Purchasers shall, at their expense, obtain engineering certificates for soil tests, foundation, footings and all bearing supports to ensure a safe and sound construction for the dwelling being erected, thus relieving the contractor of any responsibility whatsoever regarding this matter. Purchasers shall also obtain all surveys required at their own expense.

Under section 10(f), the Gorras agreed to perform "all grading and landscaping required at their own expense".

Mr. Gorra agreed that he initialled changes to clause 10(d) and (f), which deal with the relative responsibilities of the parties under the Agreement and that he also initialled the bottom of each page of the Agreement. He testified that he did not recall any discussion at the time of signing about his responsibilities under clause 10(e) of the Agreement.

Mr. Gorra further testified that Mr. Van Der Ploeg drafted the Agreement and "got them to read it". He agreed that he read the agreement and signed it, together with his wife, Kelli Gorra. Neither Mr. or Mrs. Gorra sought the assistance of a lawyer for this transaction.

Mr. Van Der Ploeg confirmed in his testimony that he had his lawyer draft this generic contract, which all the parties reviewed together. He stated that he advised the Gorras to seek the assistance of their own lawyer.

Mr. Gorra also stated that his builder never requested him to obtain the tests stipulated in clause 10(e). He agreed that he never obtained any of the engineering certificates referred to in clause 10(e) of the Agreement.

Mr. Gorra further testified that he believed that all he had to do with this home was "turn the key", with the exception of some landscaping and painting. However, he agreed that he cleared the trees from the lot, in late August 1989, at the request of the builder, and that he laid down the subfloor and underlay for the cushion flooring.

Building began on September 2, 1989, according to Mr. Gorra, who said that he assumed all the necessary permits had been obtained. Mr. Carl Rogers, the chief building official for Beckwith Township, testified that he issued a building permit dated September 1, 1989, for the Gorra house, which was apparently already under construction. He stated that neither soil tests nor grading plans were required before the issuance of a building permit for this area. He testified that he knows of no constraints upon building in this area, which is zoned rural.

Closing took place in late October 1989. At this hearing, Mr. Gorra was presented with a copy of a Promissory Note, dated October 24, 1989, signed by himself and his wife, in favour of Vanthom Builders, in the amount of \$3371.66. He testified that this amount was owing for extras like well installation, which was referred to an invoice dated October 3, 1989, from Vanthom Builders to the Gorras in the amount of \$1348.74.

Mr. Van Der Ploeg of Vanthom Builders testified that other extras, the cost of which were represented in the Promissory Note, were charges for the use of a hoe ram, and extra costs incurred in the installation of the septic system.

Mr. Gorra testified that he believed that this Promissory Note was presented to him at closing and he did not deny that he owed this money. He simply stated that he did not receive any other bills from Vanthom Builders.

Mr. Gorra also testified that towards this Promissory Note he paid his builder about \$1350 in December 1989 and an additional \$1000 by cheque, also in December. He said that he did not receive a receipt for these payments. He was unable to verify these two payments, as was Mrs. Gorra in her testimony. However, a

copy of Mr. Gorras' Bank Book shows that a withdrawal of \$1000 was made on December 18, 1989, from his account.

Mr. Van Der Ploeg testified that he had received \$1000 only from the Gorras towards payment of the amount owing under the Promissory Note. He stated that he had no records of payment because the business is now closed. Nevertheless, the Gorras still owe the amount of \$2371.66 plus interest, according to the builder.

Two weeks after moving into the home on October 25, 1989, Mr. Gorra testified that the basement flooded. In response to his complaint, the builder installed a sump pump. In the spring of 1990, flooding occurred again in his basement. Mr. Gorra stated that he complained to his builder in writing, who suggested that he obtain assistance from local authorities to drain the ditches.

Mr. Don Edwards, a neighbour of the Gorras and retiree, testified that he has resided all his life in this area, which is very wet. He stated that the area "has been flooded every year for the last 35 years", although he believes that the weather during the construction of the Gorra house in the summer/fall of 1989 was exceptionally dry. He agreed that his house is built up on fill and that he regularly has to take steps to drain his property.

Mr. Gorra complained of "constant and excessive water seepage into his basement", in a March 1990 letter to his builder, a copy of which was received by the Program on March 28, 1990. In response to Mr. Gorra's complaint, the builder took the position that the water seepage into the basement was attributable to improper draining from township ditches, an overflowing well, which it was agreed that Mr. Gorra had repaired, and lack of grading around the house, which was also agreed to be Mr. Gorra's responsibility under the Agreement. In his March 1990 letter, Mr. Gorra had also complained of drywall deficiencies and the builder agreed to repair them, at no cost, as a gesture of good customer relations.

Mr. Gorra requested a conciliation from the Program on August 21, 1990, complaining again about the water seepage and "mold all over". Also in this conciliation request, Mr. Gorra indicates that he held back \$2100 from the builder at closing.

The Program performed a conciliation inspection on September 21, 1990, and reported as warrantable defects that a basement screen was missing, the bathtub was off level and the drywall showed poor workmanship. At this hearing, Mr. Gorra complained that the basement screen has not yet been provided, the drywall still requires finishing; and the bathtub, in the process of being made level, was scratched and dented by the builder, causing a cosmetic concern.

Also in the conciliation report of September 1990, the Program took the position that the following items were not covered under the first-year warranty:

- 1) gaps between foundation floor and basement floor slab, which were not warranted because the Program found them to be acceptable construction practice and not an infraction of the building code; Mr. Gorra disagreed, testifying that these gaps let water into the basement.
- 2) a crooked wall between the bathroom and master bedroom, which the Program found was not readily discernable; this was not a load-bearing wall. The Program found this to be within acceptable tolerance but Mr. Gorra disagreed.
- 3) excessive humidity, with "mold all over", which the Program regarded as excluded from coverage under section 13(2)(e) because the homeowner must maintain adequate ventilation to prevent such damages.
- 4) excessive water seepage into the basement, which was not warranted because the leakage had not been verified. In the conciliation report, the Program notes: "The owner reports that leakage occurred during spring runoff and seepage occurs at the floor cracks at odd intervals. After viewing the home, it is evident that the home is situated in a low lying area and there is some suggestion that the home may be in a flood plain area".

Mr. Philip Mayhew of the Program testified that he was able to confirm water seepage into the basement of the Gorra home on October 18, 1990. He stated that he observed about a cupful of water on the basement floor and concluded that the formwork in the sump pump should be removed. He testified that is why the complaint of water seepage in the basement was found to be a warrantable defect.

However, difficulties ensued with the repairs. Mr. Gorra admitted that he refused entry to his builder to perform repairs of this defect, on at least one occasion in November 1990.

Letters by Vanthom Builder to both Mr. Gorra and the Program suggest that Mr. Gorra repeatedly denied access to the builder to perform the repairs, during the months of October/November 1990. In a letter dated October 22, 1990, Mr. S. Thomson of Vanthom Builders wrote that the builder was "willing and able to perform the necessary warranty repairs", but was being prevented from doing so by Mr. Gorra.

The Program attempted to conciliate this dispute and a

meeting was held in November 1990. At that time, Mr. Gorra testified that he informed the Program that he had water in his garage, which the Program said would be a warrantable defect. No Proof of Claim form was filed by Mr. Gorra respecting this complaint.

By letter dated February 6, 1991, the Program advised the Applicants that the repair methods proposed by the builder to remedy the water seepage problem were "feasible and acceptable" to the Program. The builder had retained Ashton Engineering, which proposed in a report dated January 3, 1991, that the builder deepen the existing sump pump pit, install a second sump pump and redesign the underslab drainage system if necessary (the "Ashton Repair Proposal").

Mr. Kerry Ashton of Ashton Engineering, and a civil engineer since 1977, estimated the costs of repair to be about \$750 to deepen the sump pit; \$1500 to install a second sump pump; and \$8 - 10,000 to install an internal drainage tile system. He agreed that the last modification would result in the loss of about 4-6 inches of head space in the basement.

He added that as a structural engineer he would recommend prior to construction a fully waterproof system. When he visited the site in November 1990, a considerable amount of standing water on the lot made it difficult to assess the grading around the house. He added that the heavy vegetation and drainage ditches around the property would have indicated to him that this was a water-prone area.

Mr. Gorra agreed that he was present during the inspection by Ashton Engineering on November 27, 1990. Under cross examination, he stated that Ashton Engineering was correct in noting its Report that Mr. Gorra said that the basement had suffered one major flood in the spring of 1990, which was coincident with a power failure. Mr. Gorra also agreed that he informed Ashton Engineering that during normal conditions the sump pumps were capable of sustaining the ground water flow, although during the spring thaw, minor seepage would occur through a floor slab crack.

In its February 1991 letter, the Program suggested that the Applicants allow the Ashton repair; if proven unsatisfactory, the Program would then direct the method of repair. The Program also stated in its letter that it was the Applicants' decision to proceed with this repair method or not. The Gorras were also told by the Program that they had the right to appeal if they disagreed with the Program's position respecting the Ashton Repair Proposal.

Mr. Gorra testified he disagreed with the Ashton Repair

Proposal. Upon receipt of the February 1991 letter from the Program, Mr. Gorra's solicitor advised the Program, in a letter dated March 4, 1991, that his client disputed the method of repair and intended to obtain his own repair proposal. This was provided to him in December 1991, by Oliver, Mangione, McCalla & Associates Limited, Consulting Engineers, Hydrogeologists and Planners (the "Oliver Repair Proposal").

Briefly, the Oliver Repair Proposal recommended that the Gorra house be raised to ensure that it is out of the local water table, at an estimated cost of about \$40,000.

Mr. James Haliburton of Oliver, Mangione, a structural engineer for the last 3.5 years, testified that he participated in drafting the Oliver Repair Proposal, on behalf of the Applicants. He agreed that the study period for the Proposal was April to October 1991, which includes a 4-month period during which the water table is higher than the basement floor. He stated that the house site acts like an open bowl into which water flows and is pumped out by sump pumps and that "swamp-like conditions exist".

Under cross-examination, Mr. Haliburton agreed that he never observed any flooding at the Gorra home. He also agreed that the Ontario Building Code does not require the basement floor to be built above the water table, although as an engineer, he believes this is prudent practice. In his Report, Mr. Haliburton did cite section 9.14.6.1. of the OBC, which states that "the building shall be located and the building site graded so that water will not accumulate at or near the building and will not adversely affect adjacent properties". He agreed that the Applicants could improve the grading of the property, which would help to redirect excessive surface water flow.

He further agreed that raising the house is the "Cadillac or final solution" to the water seepage problem and is admittedly expensive. He regarded the methods advocated in the Ashton Repair Proposal as capable of being effective against flooding so long as there is a power source for the 2 sump pumps. He did not know the cost of implementing the Ashton Repair Proposal. He agreed that both methods of repair would temporarily inconvenience the Applicants.

Finally, he agreed that if he were retained under the terms of clause 10(e), he would be concerned about the presence of a high water table and consider its implications in properly constructing the foundation of the home.

Mr. Henry Krzywicki, a professional engineer since 1964, disagreed. Upon review of clause 10(e) of the Agreement, he stated that in his opinion, the clause requires only a footing inspection

and not a geo-technical inspection. If retained under such a clause, he would visually exam the soil, after excavation was completed. His only purpose would be to establish that the soil was competent to handle the footing loads because he inspects subject to his specific retainer.

He stated that the presence of a high or perched water table or even swampy conditions, or the observation that neighbouring homes were raised, would have no bearing on his evaluation of the load-bearing capacity of the soil. However, he did agreed that as a foundation engineer he would recommend building a home so that the basement is above the permanent water table. He agreed that solutions to water seepage included raising the foundation or backing up the sump pump with a generator to handle power failures.

In its decision letter dated April 23, 1992, the Program responded to the Oliver Repair Proposal, refusing the Gorras' claim. The flooding was attributable, in the Program's view, to the Applicants' failure to obtain the services of a qualified soil engineer, who would have discovered the ground water level and advised construction modifications at the excavation stage. Additionally, the Program took the position that the flooding was not a warrantable defect when caused by power failures that disabled the sump pumps. These were beyond the control of the builder and excluded under section 13(2)(i) of the Act, as an act of God.

Mr. Gorra testified that the flooding occurs during periods other than during power outages, which nevertheless have occurred over a dozen times in the last 4 years. During these power failures, he is required to borrow a neighbour's generator to reactivate the sump pumps, which must run continuously during the spring and summer.

Mr. Paul Picard of the Program, who authored the decision letter of April 1992, testified that the Program regarded the Ashton Repair as a very reasonable method of repair and one which the Program had relied upon in the past. In his view, this builder always expressed willingness to do the necessary warranty repairs but as of May 15, 1992, the builder went out of business. The builder, in writing, has now rescinded the offer to do those repairs.

Mr. Picard added that in his view the entire cause of the water seepage into the Applicants' basement was their failure to do any grading around the house, which is like a "reverse swimming pool". He asserted that a qualified engineer would have noted the problem of the high water table and recommended construction solutions.

Mr. Van Der Ploeg of Vanthom Builders testified that in his view the land must be graded away from the house. He stated that Mr. Gorra used a bulldozer to scape away the top soil and has created a "moat" around his home. He stated that the drainage ditches must be kept clear particularly during the spring runoff. He disagreed that conditions are swampy and noted that no water was present during the construction of the home.

Mr. Picard confirmed the Program's position as set out in the Conciliation Report of October 1990 and the decision letter of April 1992. However, under cross-examination, he agreed that the Applicants were never explicitly informed by the Program that if they refused to allow the Ashton repair to proceed, the result would be that the Program would disentitle them. He testified that "this was understood" by the Gorras.

Mr. Stephen Walker is a geotechnical engineer since 1978 and involved in site investigations, slope stability studies, inspections and consultation respecting foundation design, hydrological studies, permafrost engineering, and groundwater studies. He testified that he has been retained frequently by the Oliver Mangione firm.

At the request of counsel for the Program, Mr. Walker reviewed the Oliver Report and the Ashton Report and clause 10(e) of the Agreement, and summarized his findings in a report dated June 11, 1993. He agreed that he did not visit the site of the Gorra home.

Mr. Walker testified that he found the Ashton Repair Proposal offered the most reasonable and logical method of repair. He stated that his firm would recommend this method of repair, finding it simpler, less costly and less disruptive than the method advocated in the Oliver Repair Proposal. However, he agreed that the latter method would provide the greatest safety from flooding.

Mr. Walker also testified that if he was retained under clause 10(e) he would test the soil and groundwater conditions of the site. He stated in his report that "the determination of the position of the water table is routine and of utmost importance in our assessment of the site conditions". He stated that he would be concerned about a high or perched groundwater table and "swamp conditions on the adjacent lands", whether or not groundwater was observed in the excavation. He concluded that if the groundwater conditions were determined to be severe, he would recommend constructing the house above the water table, on backfill placed and compacted in the excavation.

Counsel for the Applicants asserted that the main issue under appeal is the warrantability and method of repair of the

water seepage into the basement. He argued that the Gorras simply exercised the option that the Program gave them in February 1991, that is, to appeal its decision respecting the method of repair for the water seepage problem that had been found to be warrantable. However, about one and a half years later, the Gorras are informed by the Program that the water seepage problem is now considered non-warrantable, on the basis of clause 10(e) of the Agreement, which had long been in the possession of the Program.

He further argued that clause 10(e) is ambiguous, suggesting one kind of inspection to Mr. Henry Krzywicki and another kind of inspection to others, the results of which are merely speculative. Given that the builder drafted the contract, any ambiguity should be construed against the builder.

Furthermore, counsel argued that the builder was at fault for building the house too low, on flat, flood-prone land, where grading would have little effect. He stated that in spring and fall, this home is regularly surrounded by water, and the Oliver Repair Proposal provides the safest, surest method of resolution.

Respecting the Promissory Note, counsel argued that the amount owing is disputed, basically non-collectable by the builder who is out of business and thus should not be set off against any compensation awarded to the Applicants.

In summation, counsel for the Applicants argued that the Gorras have been treated unfairly by the Program under what is clearly consumer protection legislation. He asserted that the Program acted improperly in rescinding its warranty for the water seepage on the basis of clause 10(e), and on the basis that the Applicants refused access to the builder, who was arguably at fault, because they were seeking a second opinion and exercising a right to appeal.

In response, counsel for the Program argued that the Applicants are seeking compensation for a problem that was avoidable if they had abided by the contract, which they agreed they read and amended to suit themselves. He asserted that clause 10(e) was not considered ambivalent by 3 qualified engineers who all stated that it is important to determine the water table level. He argued that the balance of the evidence indicates that if the Applicants had complied with clause 10(e) of the Agreement, they would have been informed of construction options, thus avoiding the water seepage problem entirely.

He asserted that the Act disentitles the Applicants to warranty coverage for water seepage into the basement, specifically the following sections:

- section 14(1)(b), which requires that the owner have a "cause of action" against the builder, which it is argued has been eviscerated by the Applicants' breach of the Agreement, specifically clause 10(e);

- section 14(2), which requires that any benefit to the owner be considered in the assessment of damages. Counsel argued that the Applicants received both the benefit of the unpaid Promissory Note and the benefit of the builder's willingness to do repairs, which they unreasonably rejected in denying access to the builder;

- section 14(3), which permits the Program to perform repairs. Counsel argued that caselaw supports the proposition that the Program decides the repair method, which if rejected by the owner, disentitles that owner to compensation.

This Tribunal agrees with counsel for the Program that the evidence clearly establishes that the repair method advocated in the Ashton Report is reasonable and satisfactory under the circumstances. Furthermore, this Tribunal relies upon Metropolitan Condominium Corporation No. 813, a decision by the Tribunal on January 8, 1993, which was upheld upon appeal to the Divisional Court, February 11, 1994, and agrees that if the owner acts unreasonably in refusing a satisfactory offer of repair, no breach of warranty exists. Therefore, this Tribunal, finds that so long as the Applicants continue to reject the reasonable repair method proposed in the Ashton Report, there exists no compensable breach of the two-year warranty for water seepage into the basement of their home.

Nevertheless, prior to this hearing, these Applicants did not act unreasonably in disputing the Ashton Repair Proposal. They were invited to do so by the Program in its letter of February 1991. The evidence supports a finding that the Gorras, on more than one occasion, refused access to the builder during late fall of 1990. However, this finding cannot bar the Applicants from recovery because they had reasonable grounds for their unfortunate belief that they were entitled to do so. One of those grounds is that the Gorras were not informed of the Program's formal reasons to deny them compensation until April 1992. Shortly thereafter, the builder went out of business and rescinded its offer to repair. This is an unfortunate event that nevertheless cannot bar the Gorras from coverage under the Act, if they are otherwise eligible.

Are the Applicants eligible under section 14(1)(b) of the Act, given the arguments respecting clause 10(e) of the Agreement? Firstly, this Tribunal finds that the Applicants cannot be excused from their obligations under clause 10(e). The evidence of the Gorras that this was a contract for a "turn-key" home is

inconsistent with their involvement under this contract, from clearing the lot to grading and landscaping. Whether or not the Gorras understood the implications of failing to abide by clause 10(e) of the contract, it is clear to this Tribunal that this contractual process was interactive from the beginning.

In the view of this Tribunal, clause 10(e) is not ambivalent in setting out the scope of a professional engineer's retainer to perform tests that would include some consideration of the water table level. The evidence of Mr. Walker, in particular, is preferred to that of Mr. Krzywicki in this respect. If the Gorras had complied with their obligations under clause 10(e), they may have been able to save themselves much aggravation.

Having found that the Gorras breached an obligation under their Agreement with their builder, does it follow that they have no cause of action against the builder for damages for breach of the warranty to provide a water-tight basement for 2 years?

In the view of this Tribunal, the answer is no. The key word is that the Gorras may have been able to avoid the water seepage problem, if they had complied with the terms of clause 10(e). This Tribunal finds it too remote an assumption that this home, located where it is, would have been safe from the possibility of any water seepage into the basement during the first two years, which is the warranty to which these Applicants are entitled, if the Applicants had obtained engineering certificates for soil tests. The result is that these Applicants, despite their breach of a term of their Agreement, retain an arguable cause of action against the builder that is sufficient for the purposes of the Act.

Respecting the Promissory Note, this Tribunal finds that the Gorras became legally obligated under a clear commercial promise to pay a stipulated amount. In order to determine the balance owing under the Promissory Note, the Tribunal favours the evidence of Mr. Van Der Ploeg of Vanthom Builders, who was found to be credible. The evidence of the Gorras was vague on this point. Therefore, for the purposes of section 14(2) of the Act, this Tribunal finds the Gorras received a benefit in the amount of \$2371.66 plus interest from their builder, pursuant to the Promissory Note.

The Tribunal also finds that the Applicants presented no evidence whatsoever, except the opinion of Mr. Gorra, that the alleged defects of 1) gaps between foundation floor and basement floor slab, and 2) a "crooked" wall between the bathroom and master bedroom constitute breaches of any of the first-year warranties set out under section 13(1) of the Act. Therefore, these claims fail.

With greater reluctance, this Tribunal finds that the claim of excessive humidity and "mold all over" is barred under section 13(2)(3). Counsel for the Applicants conceded that this complaint is not under appeal but should be seen as evidence of excessive water seepage into the home, which has been addressed by this Tribunal.

Nevertheless, this Tribunal noted with sympathy the testimony of Mrs. Gorra about the effects of excessive humidity in her home. She testified that her home has a musty smell all the time and there is mold and mildew growing on the walls throughout the house, including in the childrens' rooms. She stated that everything in the basement has this "mildewy" smell and she can keep nothing of value in the basement.

Certain other defects were found warrantable by the Program and the evidence is that they have not yet been remedied satisfactorily, namely, a missing basement screen, minor scratches and dents to the bathtub and some drywall finishing.

Therefore by virtue of the authority vested in it under section 16(3) of the Ontario New Home Warranties Plan Act, this Tribunal directs the Program:

- 1) To remedy the warrantable defects of a missing basement screen, minor scratches and dents to the bathtub and some drywall finishing, or provide compensation in lieu thereof, subject to set-off;
- 2) To otherwise disallow the claim of the Applicants, so long as the Applicants continue to reject the reasonable repair method proposed in the Ashton Report because there exists no compensable breach of the two-year warranty for water seepage into the basement of their home; and
- 3) To set off the benefit of the unpaid balance under the Promissory Note in any assessment of damages, if the Applicants elect to accept the Ashton repair method or compensation in lieu thereof.

GRIESE, DONALD

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding
HERBERT ROBERTSON, Member
JOHN HURLBURT, Member

APPEARANCES: DONALD GRIESE, on his own behalf

BRIAN M. CAMPBELL, counsel, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 14 December 1993 Toronto

REASONS FOR DECISION AND ORDER

Mr. Donald Griese appeals a decision by the Ontario New Home Warranty Program denying his claim for a deposit refund. Mr. Griese is claiming the maximum compensation of \$20,000 that is permitted under section 6(1) of Regulation 892 to the Ontario New Home Warranties Plan Act (the "Act").

In its decision letter dated March 25, 1993, the Program relied principally upon section 14(2) of the Act to deny compensation. Under this section, the Program set off a credit of \$70,000, which Mr. Griese allegedly received from the vendor by way of agreement, against Mr. Griese's deposit refund claim of \$20,000.

Additionally, the Program pointed out in its decision letter that Mr. Griese's claim of \$65,000 in total was subject to the maximum compensation payable of \$20,000. Secondly, the Program queried whether the home qualified for enrolment under the Act, in light of the vendor's non-registration in the Program.

In argument before this Tribunal, the basis for the Program's decision was amended. The Program no longer relied upon the grounds set out above to deny Mr. Griese's deposit refund claim.

The Program continued to rely upon section 14(2); however, the Program wished to set off against Mr. Griese's claim some \$47,000, and not the alleged credit of \$70,000. This amount of \$47,000 constituted the proceeds received by Mr. Griese from the sale of the home under a power of sale, which had been paid into court in March 1992. Additionally, the Program alleged that Mr. Griese had failed to meet the requirements of section 14(1) of the Act. Towards this, the Program argued that Mr. Griese breached the Memorandum of Agreement with the vendor. If so, Mr. Griese would

not have "a cause of action in damages against the vendor for...the vendor's failure to perform the contract", as required under section 14(1) of the Act.

These amendments to the Program's position were not apparently communicated to the Applicant in advance of this hearing. In the view of this Tribunal, fairness to applicants dictates that the Program make reasonable effort to communicate to the applicant the grounds upon which the Program will be relying at the hearing, if such grounds differ substantially from those set out in the formal decision letter. This should be done sufficiently in advance of the hearing to avoid the perception of unfairness to the applicant.

However, in the view of this Tribunal, this particular Applicant was not unduly prejudiced by the Program amending the grounds for its decision to deny compensation.

Of key importance to the Program's decision to deny compensation are the written agreements between Mr. Griesse and the vendor. First is the Memorandum of Agreement dated July 15, 1989, and signed by Mr. Griesse (in trust), as the Purchaser, and Lajeunesse Executive Homes Inc., as the Contractor (the "Agreement"). Under the Agreement, Lajeunesse agreed to construct a home on Lot 31 for Mr. Griesse for the total contract price of \$425,000.

Also dated July 15, 1989, is another Agreement between the same parties, wherein Lajeunesse agrees to pay to Don Griesse of A.J. Tait Realty Ltd. a commission of \$70,000 (the "Commission Agreement"). This commission of \$70,000 was payable upon Mr. Griesse closing the transaction to buy Lot 31, and was "to be deducted from the sale price and credited on this closing Statement of Adjustments".

The first issue is whether Mr. Griesse has discharged the onus upon him to meet the requirements set out under section 14(1) of the Act.

The evidence was conflicting as to which party breached the contract. Mr. Griesse testified that Lajeunesse deserted the building site, thus failing to perform the contract. By February 1990, the Applicant had written to the Program, stating that the builder had stopped work on the home "because [Mr. Griesse] would not pay any further draws until the trades were paid"; the Applicant further stated in the letter that there were currently \$48,000 in liens upon the home.

Mr. Griesse also took the position that Lajeunesse breached section 18(b) of the Agreement, which required the contractor to comply with all HUDAC requirements, including registration.

Mr. Lajeunesse, who testified that he was a registered builder

with the Program, took the position that Mr. Griese breached the Agreement. According to Mr. Lajeunesse, Mr. Griese defaulted under the contract, principally, by failing to make specified partial payments on time, and secondly, by failing to remove liens incurred as a result of missed payments.

Under section 4 of the Agreement, Mr. Griese was required to pay Lajeunesse \$90,000 upon execution of the Agreement in July 1989. He was further required to pay a total of \$190,000 by the time the plumbing, electrical and heating work had been roughed in. An appraisal dated September 1990 indicates that this work had been substantially completed.

There is no dispute that Mr. Griese paid only \$20,000 towards the first instalment by cheque dated August 17, 1989. He paid further amounts of \$20,000 on September 11, 1989, and \$25,000 on October 24, 1989, for a total payment of \$65,000.

However, the parties do dispute the reason for Mr. Griese's admitted failure to pay the total amount of \$190,000 that was required under the Agreement. Mr. Griese states that parties agreed orally at the time of executing the Agreement to credit the \$70,000 commission against the first instalment owing of \$90,000. He maintained the same position in his Statement of Claim against Lajeunesse dated February 1991. Mr. Griese further admitted under cross-examination that he never performed any of the real estate services contracted for under the Commission Agreement.

Mr. Lajeunesse alleged that the parties never agreed to amend their contract to allow for such a credit arrangement. He testified that he required the Applicant's payments under the Agreement to continue to complete the home. He stated that he made demand for full payment of \$190,000 under the Agreement and received only \$65,000 from the Applicant. Mr. Lajeunesse contended that if the Applicant had paid the amounts specified in the Agreement, he would have managed to "stay afloat".

In a letter to the Program dated July 4, 1990, he alleged that the failure of Mr. Griese to pay his draws caused the liens to be placed upon the home, which stopped construction and prevented the closing of the transaction. He agreed that he left the building site in December 1989 and ceased operations in March 1990. However, Mr. Lajeunesse was vague respecting many of the financial details surrounding the close of his operations.

This Tribunal found the testimony of both Mr. Griese and Mr. Lajeunesse far from compelling. However, upon all the evidence presented, this Tribunal finds sufficient evidence that Mr. Griese arguably had a cause of action against the vendor, Lajeunesse, for breach of contract.

That evidence includes two letters written by Mr. Griese's solicitors, dated December 14, 1989, and January 9, 1990, arguing such a breach on the part of Lajeunesse. The letter of January 9, 1990, argues, for example, that the Agreement, drafted on behalf of Lajeunesse, does not permit the vendor to terminate the Agreement for an overdue payment but only allows for the charging of interest.

In the view of this Tribunal, the bare test set out under section 14(1) requires the Applicant to adduce sufficient evidence, upon the balance of probabilities, to substantiate his claim that he has an arguable cause of action against the vendor for breach of contract. Mr. Griese is not required to demonstrate to the satisfaction of this Tribunal that he undoubtedly would have succeeded in his cause of action against the vendor for breach of contract.

Having found that the Applicant has discharged the onus upon him under section 14(1), the next issue is the applicability of section 14(2) of the Act. This section mandates the Corporation to "take into consideration any benefit, compensation or indemnity payable to the person or owner from any source".

Mr. Griese admitted under cross-examination that he received the sum of approximately \$47,000 from the proceeds of the power of sale of the home. The Tribunal notes that the Applicant was not forthcoming about receipt of this amount and attempted improperly to reduce this amount by deducting his legal costs. Mr. Griese did however point out that he had been unable to collect upon another judgment, dated September 16, 1992, against Lajeunesse in the amount of 49,207.59, plus interest.

This Tribunal finds that section 14(2) applies to reduce the Applicant's deposit refund claim. All monies received by the Applicant from any source, including in particular the entire monies received from the power of sale proceeding, are to be set off against the Applicant's claim.

We note that the Applicant has requested that interest be paid upon his deposit refund. The Program, by letter dated February 15, 1993, has agreed to pay such interest.

Therefore, by virtue of the authority vested in it under section 16(3) of the Ontario New Home Warranties Plan Act, this Tribunal orders that the Program allow the Applicant's deposit refund claim, with interest, subject to all limits under the Act, including, in particular, a set-off under section 14(2) of the Act as provided for above.

HALTON CONDOMINIUM CORPORATION NO. 169

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE ONTARIO
NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chair, presiding

APPEARANCES:

DERECK A. SCHMUCK, representing the Applicant

BRIAN M. CAMPBELL, representing the Ontario
New Home Warranty Program

DATE OF

HEARING: 16 December 1993

Toronto

REASONS FOR DECISION AND ORDER

This is a claim by Halton Condominium Corporation No. 169 for \$13,191.00 against the Ontario New Home Warranty Program constituting the amount paid by the Corporation for the installation of roof anchors on its building.

Begun on August 13, 1987, the building was substantially completed in February 1989 and the condominium registered on May 1, 1989. Situated in Burlington, the condominium contains 83 units in a 12-storey structure. On October 10, 1989, all of the owners attended a meeting at which time a Board of Directors was elected and the condominium turned over to Halton Condominium Corporation No. 169.

Prior to the expiration of the first year warranty, the Directors commissioned an audit of deficiencies to be conducted by Robert Halsall and Associates Limited. This report was conveyed to the Ontario New Home Warranty Program on April 27, 1990 prior to the expiration of the first year warranty.

Although the report contained a list of 270 deficiencies, only the following reference was made to the roof anchors:

2.6 Window Washing Anchors

The Ministry of Labour requires that anchors for window washing operations be provided. These anchors are indicated on architectural drawing No. 11. This requirement became law on August 18, 1988

and is retroactive under Ontario Regulation 527-88 to all buildings, and was law prior to turnover of this building.

The placement of these anchors generally appears to be in accordance with the drawings and allow access to all window drops.

2.6.1 Certification of Window Anchors not Provided

Certification that the window washing anchors provided comply with the above noted regulation should be provided. This includes drawing showing safe tie-back locations, stamped by a professional engineer, for positioning at the roof access door.

It is to be noted that the report requested only certification of the window anchors. The builder responded on December 15, 1990:

Item 2.6.1 Window Washing eyes

Enclosed is a copy of the inspection report from Construction Control in which they give clearance for the window washing eyes. We feel this should meet your requirements:

April 20, 1988

Parc Developments
P.O. Box #1249, Station "B"
Burlington, Ontario
L7P 3S9

Attention: Mr. B. Kelly

Dear Sir:

Re: 1237 North Shore Boulevard, Burlington
Reinforcement Bar Installation Inspection

This report covers our inspection visit to the above project construction site on April 12, 1988 for replacement bars installation within the area of grid lines 4-13 and L-T of the roof slab.

Reinforcing bars installation was checked against project structural drawings and C.S.A. standard requirements for grade,

size, length, spacing and concrete cover. The installation was found completed as detailed per the above drawings and C.S.A. standards.

At the time of this visit, the installation of stainless steel anchors were checked and were found to be securely tied to the bottom layers of the roof slab reinforcement.

Yours truly,
CONSTRUCTION CONTROL GROUP
Mohamed R. Ishak, B.Tech.
Senior Inspector

The appellant later included in a list of deficiencies the initial request for certification and the builder on June 4, 1991 responded:

Item 2.6.1 Certification of Window Anchors
We have provided full details to Accurel Management as regards the Construction Control inspection of the installation of the anchors along with as built drawings showing their location. Nothing further should be required.

A Ms. June Collins, Property Manager for the Condominium Corporation in her evidence said that in the fall of 1991, the window washers complained that they could not wash the windows anymore because the anchors were not right and had suggested new anchors be installed. A representative of the window cleaning company she observed had said the anchors did not comply with the Regulations according to the Ministry. It appears the windows had always been washed twice a year and during those periods, the anchors were of course used.

We note that the Regulation apparently referred to was Regulation 527/88 of the Occupation Health and Safety Act, which amended the previous Regulation and required the anchors to support a load of 5,000 lbs. from the previous 4,000 lbs.

Requesting a Conciliation Meeting, five Directors of the Condominium Corporation attended at the premises together with three representatives of the Ontario New Home Warranty Plan and Mr. Halsall on November 27, 1991. The report released on December 16, 1991 addresses the issue of certification:

ITEM 2.6.1 CERTIFICATION OF WINDOW ANCHORS
Certification that the window washing

anchors provided comply with the above noted regulation should be provided. This includes a drawing showing safe tie-back locations, stamped by a professional engineer, for positioning at the roof access door.

OBSERVATIONS AND COMMENTS

An inspection of the roof revealed that a roof anchor system was installed by the Builder as required in the Ontario Building Code, Section 4.1.10.6(3). The Ministry of Labour requirement for engineered positioning of the window anchor system came into effect in August 1988, after the building permit was issued. The Program considers this matter not to be a warranty issue.

Following receipt of the report, the builder wrote to the appellant again enclosing a copy of the opinion from Construction Control Group. The appellant responded by saying the report had been forwarded to Halsall for approval, but on January 22, 1992 wrote as follows:

On behalf of our client, we wish to advise that this item has not been resolved to the satisfaction of the condominium corporation.

O.N.H.W.P. has required in its conciliation report that the builder provide a report regarding the material used and the structural method of installation in the placement of the anchor system. We feel that an acceptable report would provide evidence that the anchor system provided is in accordance with the applicable CSA standard Z91 which was a specific requirement of the Ontario Building Code at the time the drawings were issued for the permit. During conciliation, Robert Winters stated that the Warranty Program recognizes this code requirement.

Theoretically, if the anchors cannot be shown to comply with the applicable Z91 requirements, then Parc should be responsible for work necessary to make the anchors comply with the code at the time of design. In consideration of the present Ministry requirements, a

negotiated settlement would seem more realistic.

The builder replied:

We have received and read your letter of January 22nd concerning your dissatisfaction with regards to our response on the above captioned item. Having reread the letter of direction from the Ontario New Home Warranty Program, we feel that we did indeed meet the requirements as outlined.

In their direction to us, we were asked to provide a letter from Construction Control (which we did) regarding the material used (which they identify as stainless steel and which we forwarded the data sheets on to you) and the structural method of installation (which is identified as them being tied securely to the bottom layers of the roof slab reinforcement).

Given the preceding, we feel that we have met the requirement on this item.

And finally on March 18, 1992, the Program rendered its decision:

Item 2.6.2. Roof tieback anchors

The Program now feels at this time that the builder has responded to the conciliation request and the report meets the intent of the original deficiency.

It appears nothing further was mentioned by the Applicant to the Program concerning the roof tie anchors and in a letter to the Program of September 10, 1992, what was referred to as "our most recently updated list of deficiencies", this item did not appear on the list. On March 18, 1993, however, the appellant completed a Proof of Claim form to be directed to the Program. The complaint as follows:

Original roof anchor system installed by declarant did not meet requirements of Ontario Building Code. As a consequence, the Condominium Corporation was required to install a new system at its own cost.

The new anchors were installed in August 1992.

On cross-examination by Mr. Campbell, Ms. Collins agreed

that the anchors were in accord with the drawings and that no tests were made by the Condominium Corporation concerning the construction or operation of the anchors. She further agreed that there was nothing communicated to the Program within the first year with regard to poor or defective workmanship or materials. The Program was not advised that the work would be done she said and she saw no need to direct any of the quotations to it. She admitted she did not know whether a further report by Halsall of March 25, 1993 and prepared after the work was done was sent to the Program, but agreed it was not advised of any tests being conducted on the anchors. These were taken in March 1993.

Alan Bell, General Manager of Pro Bel Enterprises Ltd. testified that the anchors were composed of a 3/4" steel bar bent and welded back to itself to form an eye and cast into concrete. He said you could not guarantee the reaction of the weld to the force applied to it and it could possibly break open when pulled on a side or horizontal force. No tests, however, were made to determine if they could withstand a 4,000 lb. load.

On cross-examination, Bell admitted he was not an engineer and the only information he had was derived from the engineering firm - (presumably Halsall). He said the anchors were about 2' from the parapet wall although there was no regulation governing their location at the time the building was erected.

Jay Leedale, Group Manager for Halsall and Associates Limited was involved in the report prepared for the appellant on March 25, 1993 after the work was done. He is a professional engineer and first visited the site on March 6, 1990 for the purpose of preparing a Technical Audit to determine deficiencies in the first year. He had made the request for certification of the anchors only because he could not tell from his inspection if there was any infraction of the Ontario Building Code. For the subsequent report of March 25, 1993, he said tests were conducted to measure the load capacity and in his opinion, the anchors did not meet the 4,000 lb. requirement of the Z91-M80 C.S.A. (and referenced in the Ontario Building Code 4.1.10.7(2)).

Cross-examined by Mr. Campbell, he admitted they carried out no pull tests or calculation tests and found no defects in the materials. Neither had they found any defect in the workmanship or any violation of the Ontario Building Code as it stood at the time of construction. He said further they identified no construction fault with the anchors, but although they conducted no pull tests they did predict a load capacity by one method of analysis and that led to the conclusion, the ultimate load capacity of the anchors was about 260 lbs. The report (Exhibit 6, tab 36) reflects their conclusions:

a) Load Capacity

CSA Standard Z91-M80 states, '...anchoring systems shall be capable of resisting a force of 4000 lbf'.

Our calculations indicate that the anchors have an ultimate load capacity of about 260 lbf. At this load there would be large deformations and significant yielding of the steel.

The actual failure load is difficult to predict. This may be governed by either failure of the anchor itself or by pull-out of the anchors from the roof slab. We have not evaluated the capacity of the welds on the eye of the anchor. The most reliable method to determine the failure load would be to conduct pull-out tests on site on randomly selected anchors.

However, the applicable standard requires that the anchors be capable of "resisting" a force of 4000 lbf. Our interpretation of this requirement is that the anchors should not undergo large deformations and yielding at this load. Based on theoretical analysis, the anchors on this building have a load capacity significantly less than required by CSA Standard Z91-M80.

b) Positions of the Anchors

Ontario Regulation 527/88 has limited requirements with respect to the positions of the anchors. Section 17(a) states that lifelines, 'shall be rigged in accordance with generally accepted practice'. Section 27(b) states that lines, "shall be rigged so that each line hangs vertically..."

CSA Standard Z91-M80, Section 4.1.11 requires anchors for tie-back use to be within 45 degrees of the point of suspension. Section 4.1.6 indicates that, 'the anchor point for lifelines may be common to the tieback of the suspension support'.

The location of the anchors are shown on the attached roof plan.

By inspection of this plan, it is evident that there is at least one tieback anchor within 45 degrees of the end of each

window. Therefore, we are of the opinion that the anchors conformed to the relevant standards.

Gerry Cumming, Technical Representative with the Program's Hamilton office for the past six years testified that his inspection of the anchors satisfied him they were protected from corrosion which was one of the questions raised by the appellant. He pointed out that at the time Regulation 527/88 came in, the Warranty Program did not warranty any of the provisions of the C.S.A. Standard.

In his view, the anchors appeared to be meeting the requirements with no defects in workmanship or materials and no symptoms of any problems with them. He said he had issued the Program's final decision of May 21, 1993:

1. At the time of the conciliation, the board did not present any information to the Program that would substantiate the failure of the system in compliance with CSA Standard Z91-M80.
2. The Program was not notified by the board that the system would be upgraded to the present standard nor that the installed system did not meet the 1987 requirements, specifically related to any testing performed by the board. Therefore the Program did not have the opportunity to have the builder notify his designer for further testing of the installed system or review and report to the findings of the board's report.
3. The original complaint issued by the board within the one year of warranty coverage was for certification of the system.

Concerning quotations involving the work approved by the appellant for the installation of the new anchors, he said he had seen none and had received no information from the appellant that the work was to be done. It was only after the receipt of the Proof of Claim form that he learned about it. He observed that it was essential for the appellant to advise the Program prior to the work being done since it has to try to recoup its losses from the builder, but in this case neither were given an opportunity to see the quotes. He pointed out that the Act provides for the Program to undertake the work if it wishes or arrange for it to be performed by a firm of its choice.

In dealing with the three reasons for the Program's decision, he said had he known that Halsall was preparing a report, he would have had his own engineer on site and the Program would have had its own report concerning the load capacity of the anchors.

On cross-examination, he pointed out that where the owners proceed with repairs after conciliation then they have frustrated the Program's procedure and if they get the work done without advising the Program, the claim would be denied.

It is the view of this Tribunal that the appellant's claim must fail. There is clearly no evidence of a defect in workmanship or materials in the anchors or in their installation and that is conceded by the witnesses for the appellant. The initial report of Halsall Associates suggests no deficiency in workmanship or materials. The final Halsall report submitted by the appellant does not prove any infraction of the Ontario Building Code since no proper tests were made to determine the load capacity of the anchors. In our view, the letter of April 20, 1988 from Construction Control provided a sufficient answer to the appellant's request for certification. There was no complaint during the first year of any defect in workmanship or materials and there has been none since.

Having found no evidence to support the appellant's claim under Section 13(1), it is unnecessary for us to deal with the other issues although we are of the view that the appellant's failure to notify the Program of its intention to proceed with the work with the work in August of 1992 and not file its claim until a month later was a serious if not complete bar to its success. The Program was given no opportunity to arrange for the work to be done or obtain the necessary quotes. This immediately creates an untenable situation between the builder equally unaware of the work proceeding and the Program which is then bound to look to him for indemnity. We are therefore on all of the evidence persuaded that the appellant's claim must be disallowed.

Accordingly, by virtue of the authority vested in this Tribunal under section 16(3) of the Ontario New Home Warranties Plan Act, the Ontario New Home Warranty Program is directed to disallow the claim.

HELEN HANCEY

APPEAL FROM A DECISION OF THE
ONTARIO NEW HOME WARRANTY PROGRAM

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chair, presiding

APPEARANCES:

HELEN HANCEY, appearing on her own behalf

NETANUS T. RUTHERFORD, representing the Ontario
New Home Warranty Program

DATE OF

HEARING: 23 July 1993

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal by Helen Hancey from the decision of the Ontario New Home Warranty Program disallowing her claim for the return of \$10,000 paid by her to the builder of a home she had contracted to buy.

On March 11, 1989, Mrs. Hancey paid the sum of \$10,000 to one Sandra Stephenson, agent for the builder, Benedor Group Inc. (Canfield Homes) hereinafter called "Canfield" to reserve Lots 23 and 44 in the Town of Shelburne for a period of six days with the deposit being returned if the transaction was not to proceed.

It appears from the evidence of Mrs. Hancey that she changed her mind about the lots and on March 18 entered into an offer to purchase to buy a home being constructed on Lot 47 for \$155,000. The deposit of \$10,000 intended for the previous purchase was then applied by the builder to the deposit under the offer of March 18. It was to be a cash transaction with the balance being paid on the 18th day of October 1989, the date reserved for closing. Canfield, however, advised her on July 28 that due to bad weather conditions, the closing would have to be postponed to December 14, 1989. It appears that the appellant was in agreement with this later date.

On November 7, however, Mrs. Hancey changed her mind about the purchase and requested a release from the contract from Canfield. She said the family wanted to live together and this

influenced her decision about buying the house. As a result, a Mutual Release was entered into between her and the builder on November 7, 1989.

MUTUAL RELEASE

BETWEEN:

.....HELEN HANCEY....., Purchaser

AND:

.....BENEDOR GROUP INC....., Vendor

RE: AGREEMENT OF PURCHASE AND SALE BETWEEN THE VENDOR AND
PURCHASER(S), ACCEPTED THE..18th..DAY OF...MARCH.....,1989,

CONCERNING THE PROPERTY KNOWN AS:

.....LOT 47 ON OLDE VILLAGE LANE.....

.....THE PRINCESS ELIZABETH.....

as more particularly described in the aforementioned Agreement of
Purchase and Sale.

We, the Purchasers and Vendors in the above noted transaction,
hereby release each other from all liabilities, covenants,
obligations, claims and sums of money arising out of the above
Agreement of Purchase and Sale, together with any rights and
causes of action that each party may have against the other, and
we reimburse the deposit of:....TEN THOUSAND...Canadian Dollars
(Can \$10,000.00) to the above mentioned purchaser(s) when the lot
is resold.

This release shall be binding upon the heirs, executors,
administrators and assigns of all the parties executing the same.

DATED at Shelburne this 7th day of November, 1989..

SIGNED, SEALED AND DELIVERED
in the presence of:

[Signature]
.....
(Purchaser)

IN WITNESS whereof I have
hereunto set my hand and seal:

[Signature] *Date Nov 7/89
(Purchaser)

.....
(Purchaser)

*Date.....
(Purchaser)

DATED at Shelburne this 7th day of November, 1989..

SIGNED, SEALED AND DELIVERED
in the presence of:

[Signature]
.....
(Vendor)

IN WITNESS whereof I have
hereunto set my hand and seal:

[Signature] *Date Nov 7/89
(Vendor)

.....
(Vendor)

*Date.....
(Vendor)

RECEIVED

JUN 10 1992

BRAMPTON R/O

We note that although the release extinguished the agreement to purchase the home, it contained a covenant by the vendor to pay Hancey the \$10,000 upon the sale of the subject lot.

Mrs. Hancey in her evidence said that the deposit had not been returned to her and although the vendor had not made an assignment in bankruptcy, he could not be reached because he spent most of his time out of the country. The lot was not resold but assigned to the mortgagee, the Forresters, who sold it under a power of sale. In writing to the Program on June 17, 1992, she pointed out that the lot had been listed for sale by Canfield subsequent to the release, but at a price higher than the going market prices as a result of which it was never sold. She continued:

The Vendors had several times promised to return my deposit when monies held by the town of Shelburne were returned to them, however this did not materialize. In speaking with Sue MacKenzie, the clerk for the town of Shelburne, I found that the town had to use this money, the Letter of Credit, to complete the sodding and paving for Phase 1 of the development.

The Vendors are not available to contact and spend most of their time out of the country.

I have learned that all their properties are being foreclosed on, as demonstrated by the recent listing which again I have enclosed.

Consideration, at this time, of the return of my deposit would be greatly appreciated.

It appears that eventually when she did have an opportunity to speak to the principals of Canfield, she was advised that they did not have the money to pay her.

It is argued by the appellant that the vendor was unable to perform the contract and the Program should indemnify her in the amount of her deposit. It is further argued that the power of sale exercised by the mortgagee is in effect a sale of the property since it was transferred to a new owner.

If the appellant is to succeed in her claim against the Program, she must bring herself within Section 14(1)(a) of the Ontario New Home Warranties Plan Act:

14.(1) Where,

- (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

Mrs. Hancey is a person under the Act and not an owner since no title was transferred to her or possession taken of the property. She had entered into a contract with a vendor for the provision of a home but if she has a cause of action against the vendor, it must be because of its bankruptcy or failure to perform the contract. There is no evidence before us of any assignment in bankruptcy by the vendor and we are, therefore, left with the issue of whether or not it failed to perform the contract.

The extension of the date for closing was clearly agreed upon by both parties and so there was no breach of contract before us. The appellant sought a release from the contract some five weeks before closing which was agreed to by the vendor. By the voluntary and consensual execution of the release by both parties, the previous agreement to purchase had been terminated "together with any rights and causes of action that each party may have against the other...".

The release speaks for itself and needs no interpretation. All causes of action the one had against the other arising from the contract were now extinguished.

The release continues with the words:

...and we reimburse the deposit of:
TEN THOUSAND...Canadian Dollars (Can
\$10,000.00) to the above mentioned
purchaser(s) when the lot is resold.

In our view, this is a covenant by the vendor to pay certain funds when a lot is sold, but does not form part of the original contract which is now at an end. The fact that the monies were not repaid clearly gives rise to some action at law against the builder under the covenant embodied in the release. It does not, however, constitute a cause of action against the Program under Section 14(1)(a) since the contract referred to in that section had been terminated by the agreement of the parties.

It is our view, therefore, that the appellant's claim cannot succeed and is hereby disallowed.

ELIAS HAWA

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JUDITH A. KILLORAN, Chair, presiding

APPEARANCES:

ELIAS HAWA, appearing on his own behalf

JANE BACHYNSKI, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 25 August 1994

Ottawa

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program dated November 23, 1993. The decision claimed the benefit of the exclusion in section 13(2)(f) of the Act for "damage resulting from improper maintenance" and denied the Applicant's claim for repair of his balcony floor and leaking garage ceiling.

The Applicant took possession of his home on October 31, 1988. He testified that he complained to the builder of leaking in his garage on December 6, 1988 and repairs were done by the builder. On cross-examination he claimed to have had further leaking during 1992 and 1993 and did nothing to correct the problem. His Proof of Claim was not forwarded to the Program until July 5, 1993.

The Applicant had a valid claim in 1988 which was recognized and corrected by the builder. Although his present claim may relate to the same problem, no notice was given to the Program until more than four years after the initial repairs. Therefore, this claim does not qualify for first-year warranty coverage. In order for this claim to be compensable, the Applicant must persuade the Tribunal that his claim satisfies the requirements necessary for it to be defined as a "major structural defect" under the Act.

The Applicant called Jeff Cowey, a carpenter, as a witness. Mr. Cowey reported on his inspection of the Applicant's balcony and garage roof which occurred approximately one week prior to this hearing. He saw water damage at all four corners of the

garage and tearing on the balcony floor which had several dips in it. On cross-examination, he admitted that it was evident that leaking had been occurring for at least one or two years such that a section of the balcony could not support any weight.

Mr. Derrick Kehoe, Contracts Manager for the builder, testified for the Program. He brought the service file for the residence in question and stated that there was no record of any telephone calls or correspondence notifying the builder of further leaking after the initial repair.

Ms. Heather Mayhew, Operations Manager with the Program, accompanied Mr. Paul Rochon during his September 29, 1993 inspection of the Hawa residence. She testified that the Program received the first letter of complaint on June 27, 1993. The inspection noted drywall water damage in the garage and some soft areas on the balcony.

Ms. Mayhew testified that the damage did not constitute a "major structural defect" as it was consistent with leaking occurring over a long period of time. Any evidence of a failure of the load bearing function could not be attributed to a defect in work or materials but rather, to a leak which had not been repaired.

The Applicant did not present sufficient evidence to discharge the onus on him to prove a defect in work or materials that either affected the load-bearing function or made the home unfit for habitation. There are important policy considerations in this case. Surely a homeowner can not neglect to make repairs such that over time a more serious problem develops. If as the evidence seems to establish, there was serious leaking in the garage for at least two years, the homeowner is expected to act in a reasonable and prudent manner and make arrangements to have the problem repaired.

At the same time, this is yet another case of an Applicant who seriously misunderstands the nature of the warranty protection offered under the Act. It is important that the Program increase and improve its efforts to educate homeowners about the restricted nature of first-year warranty coverage and the requirements to be met by a "major structural defect" claim.

The Tribunal is in agreement with the previous cases of John A. McGreal (1983) 12 CRAT 164, Mr. and Mrs. John Spiteri (1983) 12 CRAT 220, Gordon J.Z. Bobesich (1984) 13 CRAT 190, and Mr. and Mrs. Louis Natale (1985) 14 CRAT 132 which outline the obligation of the homeowner to adequately maintain a house. As well, the Tribunal concurs with counsel for the Program who argued that the leakage comes within the exclusion from coverage found in

the definition of "major structural defect" which specifies "dampness not arising from failure of a load-bearing portion of the building".

Accordingly, by virtue of the authority vested in it under section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal upholds the decision of the Ontario New Home Warranty Program to disallow the claim of the Applicant.

MR. AND MRS. VESLEY HUNTER

APPEAL FROM A DECISION OF THE
ONTARIO NEW HOME WARRANTY PROGRAM

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chair, presiding
GORDON R. DRYDEN, Vice-Chair as Member
EDWARD WEISZ, Member

APPEARANCES:

MR. AND MRS. VESLEY HUNTER,
appearing on their own behalf

RICHARD CARTY, counsel, representing the Ontario
New Home Warranty Program

DATE OF
HEARING:

28 July 1993

Toronto

REASONS FOR DECISION AND ORDER

This is a claim against the Ontario New Home Warranty Plan for \$9,600 paid by the purchasers Vesley Hunter and Teresita Hunter to the vendors Landford Estates Ltd. pursuant to an offer to purchase dated the 3rd day of June 1991.

Under the offer the Hunters undertook to purchase one of Landford's Estates Homes which had been advertised as follows:

More ways to afford a new home with
downpayments from 5% and a guaranteed
financing programme.

This advertisement appears to have been placed in a New Homes and Condos for Sale magazine.

The offer called for the deposit of \$9,600 to be made in payments of \$4,000 on the execution of the contract and succeeding payments on June 28, July 31, August 30 and September 13, 1991, of \$1,400 each. There is no dispute between the parties that these monies were not paid according to the tenor of the agreement. The transaction was scheduled to close on September 30, 1991, but by agreement the closing date was postponed to October 30, 1991.

In the meantime, the Hunters had signed an application for a mortgage which appears to have been the practice of Landford to ensure the financing of its properties. A mortgage Addendum to the offer to purchase included the clause:

It is further understood and agreed that the Purchaser shall provide all necessary financial information to a designated Landford Financial Institution for mortgage qualification purposes. Purchaser must apply for mortgage approval within fifteen (15) days from date of acceptance of this offer to purchase.

In his evidence, Mr. Hunter indicated he expected Landford to provide the mortgage since the application had been made through it according to the company's instructions. He said he was guaranteed the mortgage and tendered in evidence the advertisement produced above. As a result, he continued to make the payments toward the \$9,600 deposit and attended frequently at the Landford office to enquire about the status of his mortgage. He said he was advised by one Christine Landford, agent for the company, that the reason the mortgage was taking so long was that they could not get in touch with a former company employee who ostensibly had some part in obtaining the funds.

It appears the original application had been directed to Regional Trust and the company's reply, Exhibit 3, tab 8 on June 20, 1991 advised of its inability to provide the mortgage due to the purchaser's "total debt servicing of 56.7 percent." No further mortgage application was made in the intervening months until November 19, 1991 when Beneficial Realty considered placing a first mortgage of \$115,194 on the property. This, of course, was well after the transaction was scheduled to close. The application for mortgage, although dated October 29, could not be approved until well after the closing date.

Realizing the mortgage funds were not available to him on October 30, Mr. Hunter attempted to arrange to move in to the premises as a tenant until the mortgage could be secured. This request was denied by the company and as a result, Hunter was forced immediately to vacate his apartment in favour of a new tenant to whom it had already been leased. He was then required to sign a lease on the premises he had moved into and was now in no position to close the Landford transaction even if the mortgage funds had been available. The time, however, had gone by and the vendor was not disposed to consider any further negotiations.

The evidence is that Landford's solicitor attended at the Registry office on the date reserved for closing and since the purchaser's solicitor was not in attendance (not having received the required funds), the vendor considered the transaction at an end pursuant to the provisions of the agreement and appropriated the deposit of \$9,600. The provision invoked reads as follows:

It is agreed that in the event of any default or breach of this Agreement by the Purchaser, the deposit shall be forfeited to the Vendor as liquidated damages for expenses and loss of time incurred by the Vendor in connection with this Agreement, irrespective of any other right, cause or action, or remedy which the Vendor may be entitled to hereunder.

Mr. and Mrs. Hunter aggrieved and bitter over the loss of \$9,600 which, in their opinion, was to the say the least unjust now come to this Tribunal for redress. They have appealed to the Ontario New Home Warranty Plan to reimburse them since the home they had contracted for was new and the builder enrolled in the Program. Their claim, however, has been denied.

In order to succeed, the appellants must bring their claim within the provisions of Section 14(1)(a) of the Ontario New Home Warranties Plan Act which reads:

14.(1) Where,

- (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract; the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

It is clear from the evidence that the Hunters have satisfied the first condition of the section in that they entered into a contract with a vendor for the provision of a home and the second condition in that they suffered financial loss. Since however, the vendor did not make an Assignment in Bankruptcy, the issue becomes one of the performance of the contract.

The appellants must prove that they were ready, willing and able to close the transaction to maintain an action against the vendor either for damages or specific performance. The evidence, however, does not support the claim. There is no evidence before this Tribunal that Mr. and Mrs. Hunter had put their solicitor in funds, that they had executed the necessary mortgages or that they were even able to close the transaction on the closing date. It is unfortunate that these people did not give their solicitor more specific instructions, but we have no evidence of a solicitor's

involvement in the affair until after the vendor appropriated the deposit.

We are of the view that the appellants depended entirely on Landford to arrange the mortgage and this is supported by the documentary evidence. There is, however, no provision in the offer to purchase or accompanying documents obligating the company to provide the financing and the Hunters should, therefore, have attempted to make their own arrangements for financing after they were turned down by Regional Trust.

It is clear, however, that these were trusting people, unfamiliar with the legal intricacies and contractual obligations arising out of their simple purchase of a house. It is equally clear that they were dupes who had fallen prey to the sharp and questionable practices of an experienced predator. They were clearly misled by the advertisement guaranteeing the mortgage, induced by the mortgage Addendum requiring their financing application to be submitted to a designated Landford Financial Institution and lulled into a false sense of security by Landford's agents until the day they lost their money.

It is an unfortunate affair, but it is not a claim this Tribunal can sustain under section 14(1)(a) of the Act. Of course, the vendor was ready, willing and able to close, of course their solicitor was in attendance at the Registry Office and of course the transaction was terminated that day as the company considered its legal position to be unassailable. Although this Tribunal cannot find in favour of the appellants, it nevertheless cannot condone the pernicious practice of the company.

We find as a fact the appellants have no cause of action against the vendor within the provision of section 14(1)(a) of the Ontario New Home Warranties Plan Act and must, therefore, disallow the claim.

RAYMOND ILLEMAN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JAMES GRAY LESLIE, Vice-Chairman, Presiding
ANNE SONE, Vice-Chair as Member
HANS G. KEPPLER, Member

APPEARANCES: RAYMOND ILLEMAN, appearing on his own behalf

NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: 31 August 1993 Toronto

REASONS FOR DECISION AND ORDER

The appellants Raymond and Danuta Illeman purchased a new home at 388 McKellar Street in Strathroy under contract with the builder Thompson Homes and took possession on August 14, 1990.

Not long thereafter on January 3, 1991, they made their first claims against the builder alleging certain deficiencies in materials and workmanship in a list directed to the Ontario New Home Warranty Program.

A conciliation meeting was arranged for March 5, 1991, at which the major items were found to be infractions of the Plumbing Code. There were other items, but these were de minimus and easily corrected or repaired. The inspector, one Robert Gibson on behalf of the Program observed:

The plumbing throughout the dwelling unit has not been installed properly in accordance with the Plumbing Code, therefore the builder is to rectify all problems and get the house inspected and passed by the Plumbing Department in this area.

The builder thereupon addressed the problem to the satisfaction of the Chief Building Inspector of the Town of Strathroy and directed a copy of his report to the Program.

Following a recent reinspection of the above-noted residence with respect to the

outstanding plumbing deficiencies, please be advised that to the best of our knowledge the plumbing as installed at this time complies with the Plumbing Code; that the previously noted deficiencies have been repaired and/or eliminated and that this department hereby certifies that this plumbing has been constructed in compliance with the Plumbing Code.

On July 3, 1991, a further inspection was carried out by the Program and in his report to the owners, Mr. Gibson advised that he had found all complaints had been addressed by the builder to the satisfaction of the Program. The response from Illeman, however, contained a list of 30 items alleged still to be deficient. We note this is two day's before the first year warranty expired. It appears Illeman also complained to the Town of Strathroy since the Building Inspector attended at the premises and issued a further report on September 3, 1991. His only finding in support of any of the complaints was the lack of insulation and wall sheathing paper and some windows not properly insulated and sealed around the perimeter in accordance with the Code.

On September 4, Mr. Gibson reported to Illeman that the deficiencies in the insulation would be addressed, but in the meantime Illeman directed another list of complaints to the Building Inspector of the Town of Strathroy. Mr. Jerry Damen, the Inspector found no further violations of the Ontario Building Code and reported to Illeman on September 18 accordingly.

Now completely disenchanted with the findings of the Program and the Building Inspector, Illeman demanded the Program have someone "of higher authority than Mr. Gibson" inspect the house and refused to have the builder return. With his letter to the Program, the appellant enclosed a list of some 24 items he considered still deficient. This appeal is based on those complaints after Illeman received the Program's decision letter of November 14, 1991.

Mr. Illeman was the only person to give evidence on his behalf and his evidence has not impressed this Tribunal. He appears to insist upon perfection as the standard without deviation from it and as a result, his complaints, in our view, will not end.

There are, however, some deficiencies which the Program must address as follows:

- 1(a) The drop pipe of the waste and overflow fitting is not the proper length and the gasket at the junction of the tub and

- fitting must be replaced and installed to effect a water tight joint.
- 2(b) The faucets in the main bathroom had been substituted from those in the original contract. It is recognized that single lever faucets were specified in the agreement. In keeping with the Ontario New Home Warranty Program's coverage on substituted items, the Program will reimburse the owner for the difference in value between the faucets specified and the faucets supplied.
 - 3(a) The inlets on the automatic washer supply fitting are on the top and the supply piping feeds up from the bottom. Therefore, provisio must be made for draining this piping by installing drain valves at the low points of the piping below the supply fitting and make those valves accessible or turn the fittings so that it is drainable.
 - 5(b) Some alterations will be required to the piping behind the pedestal basin drywall. Repairs and painting will be required to be completed in a workmanlike manner. This must be done after the alterations have been made.
 - 5(e) There is excessive flexibility and movement in the shower base of the lower bathroom. The Program will stabilize the shower base and prevent any and all excessive movement and ensure that the seal between the base and sidewalls will meet acceptable construction standards and there will be no further leakage.
 - 5(i) The repairs to the drywall in the ceiling of the lower bathroom appears questionable and, therefore, we direct the Program to ensure the ceiling is repaired and meets acceptable standards.
 - 8(a) The lawn service pipe may not be sufficiently secured and the Program is required to ensure that this pipe cannot move in and out the wall under normal usage.

The Program is hereby directed to have the above deficiencies addressed and repaired. All other items alleged to be deficient by the appellant are hereby disallowed.

ALBERT IRVING

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
SELWYN CHARLES, Member
EDWARD WEISZ, Member

APPEARANCES:

ALBERT IRVING, appearing on his own behalf

STEPHEN AUSTIN, representing the
Ontario New Home Warranty Program

DATE OF 10 July 1992
HEARING: 7 March 1994

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from a decision of the Ontario New Home Warranty Program set out in a letter to the Applicant dated March 11, 1991. The Applicant's claim is for recovery of the sum of \$20,000 paid by way of deposits by him to Marble Arch Investments Limited operating as Marble Arch Homes, the vendor and builder of a house which he purchased from that company. The transaction was never closed and indeed, the Applicant never took any steps to try to close it. It is his case that the builder built a different house than that for which he contracted and, when he discovered this, he did not want it. It is his case that the building of the wrong house by the builder constituted a failure on the builder's part to perform the contract within the meaning of Section 14(1)(a) of the Ontario New Home Warranties Plan Act which reads:

14.(1) Where,

- (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

.....

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage

subject to such limits as are fixed by the regulations.

The evidence is somewhat extensive and must be examined in some detail to determine the right of this issue.

The first witness was the Applicant himself, Mr. Albert Irving. He said that he dealt with a sales agent of the vendor Don Levick and entered into the Agreement of Purchase and Sale (Exhibit 4, tab 1) to purchase the house to be built on Grossbeak Drive in Mississauga for \$300,900.00. This contract was made on February 1, 1989 and provided for a closing date of November 29, 1989. It was proved that he did pay the \$20,000.00 by way of deposit required, one-half on February 1 and one-half on March 1, 1989.

On the face of the Agreement, the dwelling is described as a "Brooksdale" and is said to be built with an Elevation "C". On a Schedule "A" attached to the offer, the plan is described as "Brooksdale 'C'". Attached to the offer also is a photostat of a picture of the front of the house labelled "The Brooksdale 2" and a sheet with a sketch of the floor plan of three floors with a smaller picture in the top over it labelled as the "The Brooksdale 1". An explanation was given later by a witness from the builder as to the numbers and the letters used to describe these different models.

The Applicant next filed some photographs being Exhibits 5(A) through (E) which he said were taken of the house which was built and show the differences in the design of the front elevation. Mr. Irving described the differences as being that in the drawing the bay window goes all the way up while in the photograph it is only on the main floor and there are flat windows above, in the drawing there is a large window above the garage and in the photographs there are two windows, photographs show a half moon window in the wall above the garage and it is absent in the drawing, and there are other differences in the face of the wall of the garage and there is a glass panel in the front door in the photographs and not in the drawing.

Mr. Irving said that he had signed the offer before he saw the drawings and that the agent Mr. Levy gave them to him two days later. As the construction of the house proceeded, Mr. Irving said he saw the differences appearing and he complained to Mr. Levick who said there was nothing he could do about it. He then spoke with someone else in the vendor's office about it and asked for his money back. He said he listed the house for resale with an agent, Mr. Clark (who later gave evidence on his behalf at the hearing). Mr. Irving said it was Mr. Clark who got these drawings from the Marble Arch office a couple of days later.

On cross-examination, he agreed that his complaints as to the different house were confined to the front elevation. He was referred to clause 20 in the Agreement of Purchase and Sale which states that Schedules "A", "B", "E", and "F" attached form part of the Agreement, "C" has been crossed out and there is no "D". He said he did not know whether this clause was in the same form when he signed the contract. He was referred to a drawing labelled "Front Elevation 'C'", a copy of which is Exhibit 6. He said there was a large copy of it on the wall in the sales trailer, but the agent Mr. Levick did not have a copy for him. It is to be noted that this one is different again in some respects than either of the Brooksdale Elevations 1 or 2 attached to the copies of the Agreement of Purchase and Sale in tab 1 of Exhibit 4.

Mr. Irving agreed that, at the time he bought the house he knew it was pre-sited on the lot, that is that it had been determined and agreed with the Municipal planning authorities which style of house could and would be built on this lot and what on others in the subdivision, to provide an acceptable variation of styles of houses on the street. He said that he decided that he would not occupy the house when he saw they were not building the right one. He said he was not sure just when this was, but indicated that the house was perhaps 80% completed at that time.

We have already referred to his listing the house for resale with Mr. Clark. On his cross-examination, he agreed that he had listed it on May 8, 1989 for \$349,900. He reduced it on July 31, 1989 to \$337,900, and on September 12, 1989 to \$327,900 but never got any buyers.

Upon his own evidence, the Tribunal is not able to accept Mr. Irving's statement that he refused to go on with the transaction because the builder built the wrong house or his statement that, "I intended to close and occupy the house until I saw they were not building the right house." He listed the home for resale at a profit of \$49,000 in early May, long before the closing date of November 29, a substantial time before the construction of the house was even begun (as will appear from some later evidence) and long before construction reached anything like 80% of completion which was the time he said he told Mr. Levick that he did not want the house and wanted his money back. Also, it is quite significant that he did not have the drawings upon which he bases his claim that they built the wrong house until after he had signed the contract so he could not have determined what it was he bargained to get based upon them. It is also significant that he said it was the real estate agent Clark who got these drawings for him from the vendor a few days after he signed the contract. Since Mr. Irving said he dealt only with Don Levick (and it is his name which appears as a witness on the Offer of Purchase and Sale) in connection with the purchase of the property from Marble Arch,

it is a fair inference that Irving brought the real estate agent Clark in at that stage for the purpose of affecting a resale and that Clark's interest in obtaining the drawings would be at least partly if not wholly, to see what he had for sale and perhaps to have something to show prospective purchasers as there was no house yet to show.

The next witness for the Applicant was the real estate agent Clark. He said that he had bought one of the houses in the subdivision and had introduced the Applicant to the vendor. He said that he had got the document marked "Front Elevation 'C'" (Exhibit 6 herein) from the vendor three or four days after the deal was signed which is similar to Mr. Irving's evidence on this point. He said that the model of the house indicated in the offer and on the plan does not correspond with what was built as shown in the photographs (Exhibit 5).

On cross-examination, Mr. Clark said that he too dealt with Mr. Levick on the purchase of the house which he bought and he bought it for investment purposes. He said that, in making his purchase Mr. Irving was more interested in the size of the house. He wanted around 3,000 square feet. He said Mr. Levick told him the house Mr. Irving bought was a Brooksdale Model Elevation "C".

Mr. Clark produced a document (Exhibit 7) which gave information concerning the listing of the property with his broker through himself and showing listings as follows:

May 8, 1989	\$349,900.00
June 22, 1989	349,900.00
July 31, 1989	337,900.00
September 12, 1989	327,900.00

This document also contained detailed information about the precise size of every room in the house and sets out a list of extras and refers to a Schedule with the Listing Agreement.

The first witness from the New Home Warranty Program was Steve Wheaton, the Manager of the Regional office at Brampton who dealt with the Applicant's claim. He said that the Program agreed that the Applicant had paid the \$20,000 by way of deposit, but not that he was entitled to recover it from the Program. He had contacted the builder upon receipt of the claim and received a response from the builder's solicitor which read, in part, as follows:

Mr. Irving agreed to purchase a home from Marble Arch Homes described as a Brooksdale Elevation "C" home. However, Mr. Irving obtained copies of plans (the source is unknown) which he thought were Brooksdale Elevation "C" plans but were, in fact, for the Colebrook Elevation "C" model home. Although everyone attempted to point this out to Mr. Irving, he failed to accept that the plans in his possession were not those for which he contracted. Accordingly, the Vendor was not required to advise the Purchaser that there was any alteration or change in the home being built. Marble Arch Homes, in fact, constructed the home with the elevation that Mr. Irving contracted to purchase.

This issue was raised by Mr. Irving's lawyer approximately a month prior to closing and after the house was relatively complete. Mr. Irving's lawyer was advised that the house as contracted for by Mr. Irving was being built as required; Mr. Irving's plans were incorrect. The Vendor completed the agreement according to its terms; Mr. Irving failed to attend on closing and there was a tender on the date of closing; the Vendor retained the deposit.

(see letter December 11, 1990 from Borden & Elliot to the Program at tab 3 of Exhibit 4)

Mr. Wheaton pointed out that a perusal of the Schedules to the offer shows that there is nothing in the contract to make the front Elevation "C" part of the contract. He said that on December 20, 1989, he sent a copy of the letter from Borden & Elliot to the Applicant. He got no response and he sent another letter on January 29, 1990. Mr. Irving responded to this one on February 3, 1990, in which he explained why he had not answered sooner and, on the issue raised, simply enclosed the pictures of the house as built to "show what the house built looked like, in contrast to what was originally supposed to be built". (see tab 4 of Exhibit 4)

Mr. Wheaton denied the claim and stated in his letter of March 11, 1989 (tab 5 of Exhibit 4):

It is the Program's position that you have failed to demonstrate that the unit delivered was not as per the Agreement, and that a breach of the Agreement of Purchase and Sale has occurred. It is therefore the decision of the Program, based on the evidence provided, to deny your claim.

The next witness for the Program was Mr. Peter DelGrosso, a draughtsman at the office of the architects who prepared the plans for the house and other models in the subdivision. He produced two sets of plans, Exhibit 9 being a set of plans for Brooksdale models and Exhibit 10, a set a plans for Colebrook models. For the Brooksdale models, page 4 of Exhibit 9 shows Elevation 1, page 5 Elevation 2, and page 10 Elevation 3.

Mr. DelGrosso said that a comparison of the photographs of the front of the house as built (Exhibit 5) shows it was the model shown as Brooksdale Elevation 3, being sheet 10 of Exhibit 9. A comparison of these exhibits shows that this is basically correct except that in the photographs, the garage is shown on the left as one faces the house and in the drawing, it is shown on the right.

On cross-examination, Mr. DelGrosso said that the first two Elevations for both the Brooksdale and Colebrook models were prepared in 1987 and Elevations "C" for Colebrook and 3 for Brooksdale were done in 1988. On re-examination, he explained that they started using numbers and then went to letters so that No. 3 later became the letter "C" to identify this model.

The next witness for the Program was Mr. Don Levick, real estate salesman who sold the subdivision for the Vendor/Builder and he identified his signature as witness to Mr. Irving's signature on the Offer of Purchase and Sale. He said that it was a Brooksdale Elevation "C" or "3" which he sold to the Applicant.

Mr. Levick stated very emphatically that he did not give a copy of the plans either to Mr. Irving or Mr. Clark. He said he had only one set of the plans and he did not give out copies to anyone. He also said he was forbidden to give them out to anyone.

On cross-examination, Mr. Levick said all he gave to the Applicant were copies of certain inserts and the documents attached to the offer. He said that he had no idea where Mr. Clark got the copy of Exhibit 6 and that he was not confused in his evidence and that it was not possible that he was wrong in saying that he did not give out these copies.

The final witness for the Program and at the hearing was Randy Goodman, Vice-President Construction for the Vendor/Builder Marble Arch Homes. He began by pointing out that we have here two different copies of the Offer to Purchase and Sale both found as part of tab 1 of Exhibit 4. In both the actual agreement on two sheets with the signatures on the second page appear to be identical but the attachments are different. With the first one, are attached Schedule "A" being a list of specifications also signed on behalf of both parties and a copy of "Front Elevation 'C'", (a copy of Exhibit 6), with the second are Schedules "A" (the same as with the first), "B", "E", "F" and the Ontario New Home Warranty Program Addendum.

It is to be noted that the documents attached to the second copy of the offer are precisely those stated in it in paragraph 20 to form part of the contract while this is not the case with the first copy. The evidence was clear that the first copy with the two documents attached were forwarded to the Program

by the Applicant and the second one with the documents listed in paragraph 20 was the one sent in by the Vendor/Builder.

Mr. Goodman said that no copies of the sketch of the front elevation of the house was appended to the offer or formed part of it. He said that the only documents which were part of it were those listed in paragraph 20. Mr. Goodman also told the Tribunal that, to his knowledge, the Applicant never raised with the Vendor/Builder the issue that it had built him the wrong house.

Mr. Goodman went on to say that when the house was finished and the builder was ready to close in accordance with the terms of the Agreement, it instructed its solicitors to tender upon the closing date. He understood that the Applicant took no steps at all to close.

Mr. Goodman also produced a copy of the Building Permit for the house which he said he obtained - see Exhibit 17. It is most interesting to note that this Permit was issued on June 23, 1989 and Mr. Goodman said his company began construction shortly after that date. It is clear from this that Irving had listed the property with Mr. Clark for resale well before any construction was started. It is stated on the permit itself that it was issued for "Brooksdale 'C'" (a copy of the plans for this model obviously being on file with the Municipal Planning and Building Department). He added that they had to build this model and would have needed another permit to build anything else.

On cross-examination, Mr. Goodman said that they had three front elevations for Brooksdale models and three for Colebrook models. He said that copies of these architectural drawings were not in the sales office, but rather only sales and marketing brochures and that normally they were not made part of the Offers of Purchase and Sale. He was referred to a price list which appeared to have covered this subdivision at the time and which bore date January 28, 1989. It listed 14 different models with two different types of elevation for each (Exhibit 18). There is no Colebrook shown at all and no Elevations "3" or "C" for any including Brooksdale.

Mr. Goodman referred to the solicitor's letter to which we referred above at tab 3 of Exhibit 4 which told Mr. Irving that he was simply in error in his conclusion that the wrong house was built.

Having made this analysis of the evidence, the Tribunal has no difficulty in reaching the conclusion that the Applicant's claim must fail for several reasons. In the first place, the Applicant has failed to prove that the Vendor entered into any contract other than that which it performed. The evidence quite

clearly establishes that the Vendor did perform precisely the contract into which it entered.

Alternatively even if the Applicant had established his case that he got a front elevation different from that for which he contracted, he produced no evidence whatsoever of any loss which he sustained by reason thereof upon which any measure of damages could be calculated. The Tribunal can see no basis for saying that the house which the Vendor built was worth either more or less than the one which the Applicant claimed he ordered by reason of a different front elevation, and the Applicant admitted that all of his complaints were confined to the front elevation. Even if we were to try to attach some value to his personal preference stated, the Tribunal would only do that in a case where an Applicant showed he had a real personal preference for certain features in a house in which he wished to live and would not consider this point in connection with a house obviously purchased for resale as is the case here.

It was clearly the Applicant who failed to carry out his contract here (probably because of the falling real estate market as evidenced by his failure to sell at the progressively lower listing prices). We do not know whether and when the Vendor resold the property and for how much, but the experience of the Applicant with his efforts to resell would indicate that he was probably better off to forfeit his deposit of \$20,000 than to close for \$300,900 and try to get his money out on a resale.

Accordingly, pursuant to the authority vested in it by Section 14(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow this claim.

NEIL KAMINSKI and KEVIN KAMINSKI

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding

APPEARANCES:

KEVIN KAMINSKI, representing the Applicants

STEPHEN AUSTIN, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 4 August 1994

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal by the Applicants from a decision of the Ontario New Home Warranty Program set out in a decision letter to the Applicants dated April 6, 1994. There are two issues involved, first whether the Applicants were allowed the correct amount by the vendor/builder on closing of their purchase transaction by way of interest on deposits paid by them to the vendor/builder and secondly, whether if the answer to the first question is that they were not allowed as much as they should have been, can they recover the difference in this proceeding from the Program.

The facts are not in dispute. On February 28, 1989, an Agreement of Purchase and Sale was made in writing between the Applicants as purchasers and Cedar-Mac Holdings Limited as vendor/builder to purchase an apartment unit in a condominium building to be built at 175 Cedar Avenue in Richmond Hill for a price of \$248,900. The Agreement provided for the payment of two sums by way of deposits, \$5,000 with the Offer and \$32,335 within 60 days of his acceptance. The builder, in fact, received two cheques dated February 19 and April 19, 1989 covering these payments. We do not have the dates upon which the cheques were negotiated by the bank, but both parties agreed at the hearing to accept the date of May 4, 1989 as the date from which to begin to calculate the interest on the whole amount of \$37,335. This is the date shown upon a Schedule "A" to the Statement of Adjustments prepared by the vendor for closing. (see Exhibit 6). The closing actually took place on December 20, 1989 and the vendor calculated this interest to December 19, 1989. Its calculation was the following:

DEPOSITS PAID TO DATE:

1)	\$	5,000.00	
2)	\$	32,335.00	
3)	\$	0.0	
4)	\$	0.0	
5)	\$	0.0	
6)	\$	<u>0.0</u>	\$37,335.00

ADDITIONAL PARKING

SALE PRICE	\$0.0
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DEPOSITS PAID TO DATE:

1)	\$	0.0	
2)	\$	<u>0.0</u>	0.0

Pursuant to The Condominium Act
 (see Schedule "A" attached)
 Credit Purchaser \$ 4,830.79

The balance due and paid by the Applicants on closing as shown in the Statement of Adjustments was reduced by this sum allowed for this item. Also on closing, the vendor delivered to the purchasers a document headed "Vendor's Undertaking, Direction, Warranty and Bill of Sale" (see Exhibit 7). This document contains an Undertaking on behalf of the vendor "to readjust any item on the Statement of Adjustments if necessary". The Agreement of Purchase and Sale contained a provision for the payment of this interest being paragraph 32 of Schedule "A" to this Agreement which reads as follows:

INTEREST

- 32(a) Provided that the Purchaser is not in default under this Agreement, for the period of time commencing on the date upon which the deposit referred to in paragraph 1(b) on page on hereof has cleared and the funds actually received by the Vendor or its solicitor and continuing up to the date immediately preceding the Possession Date, the Vendor shall pay to the Purchaser interest at the prescribed rate provided for under the Act on all deposit monies referred to in paragraphs 1(a) and (b) on page one hereof. Such interest shall be calculated on a straight line basis and shall be paid to the Purchaser as an adjustment on the Closing Date. However, if pursuant to the provisions of

the Act the Purchaser becomes entitled to receive interest on his deposits or any part thereof for any period or periods of time covered by the foregoing provision, then for that period of time the Purchaser shall not be entitled to interest under this Agreement with the intent that there shall be no duplication of interest payable to the Purchaser.

- (b) From and after the Possession Date the Vendor shall pay interest on money received on account of the purchase price as may be required under the Act.

The relevant provision of the Condominium Act, R.S.O. (1990), Chapter 26, is section 53(3) which reads:

- 53.(3) Subject to subsection (2), where a purchaser of a proposed unit under an agreement of purchase and sale referred to in subsection (1) enters into possession or occupation of the unit before a deed or transfer of the unit acceptable for registration is delivered to the purchaser, the proposed declarant shall pay interest at the prescribed rate on all money received by the proposed declarant on account of the purchase price from the date the purchaser enters into possession or occupation until the day a deed or transfer acceptable for registration is delivered to the purchaser.

The evidence given to the Tribunal at this hearing indicated that the "prescribed rates" at which this interest is to be calculated are the rates of interest paid on Province of Ontario Savings Office deposits, less one percent per annum fixed half-yearly on April 1st and October 1st of each year. The applicable figures herein are set out in a letter dated January 21, 1991 from a Manager of the Province of Ontario Savings Office at 439 University Avenue in Toronto to the Applicants' solicitor and are as follows:

October 1, 1989	9.75%
April 1, 1990	10.5%
October 1, 1990	9.5%

(see tab 3 of Exhibit 5)

Based upon these rates for these periods, the total of the same should be \$6,053.06 (see sheet entitled "Calculation of Interest Due" being part of the same tab 3 of Exhibit 5. This sum is \$1,227.27 more than the \$4,830.79 allowed and paid by the vendor. The vendor justified its action on the basis that the Province of Ontario Savings Office had a range of rates paid on its "Trillium Account" by a letter dated February 14, 1991 which the vendor sent to the Applicants' solicitors lists of rates paid by the Province of Ontario Savings Office on its regulation accounts and its Trillium Accounts from January 13, 1986 to September 26, 1990 and showing that it had made its calculations on the basis of the lower tier of interest in each case on the Trillium account. In a letter of February 5, 1991, the vendor states:

Where two or more rates of interest are being quoted by the Province of Ontario Savings Office, there is nothing in the Condominium Act which stipulates that we must pay the highest of those rates. We have therefore elected to pay the lower rate which we feel is appropriate.

(see tab 3, Exhibit 5)

In a letter of February 28, 1991, to the vendor the Applicants' solicitor states that the higher tier of rates should be used as the lower tier only applies to deposits of less than \$5,000. He supports this with a copy of a letter dated May 17, 1989 from the Assistant Registrar, Real Estate and Business Brokers, on the letterhead of the Ministry of Consumer and Commercial Relations to the Province of Ontario Savings Office which states in the third paragraph, "I understand the Trillium Account for deposits over \$5,000 pays the highest interest rate." No issue was taken at this hearing with this last statement as being the fact.

Upon these facts, the Tribunal must conclude that the "prescribed rates" of interest which should have been used here are the rates claimed by the Applicants and that the Statement of Adjustments should have allowed them the sum of \$6,053.06 for this item or the amount of \$1,227.27 more than received. The first question, therefore, should be resolved in the favour of the Applicants.

This, however, is not the end of the matter at this hearing. The recovery which the Applicants are seeking here is not a recovery against the vendor/builder for loss or damage for breach of contract, but rather a recovery against the Program pursuant to the provisions of the Ontario New Home Warranties Plan Act. To succeed with this, they must bring their claim within the provisions of section 14(1) of the Act:

14.(1) Where,

- (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

.....

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

Clause (b) of section 14(1) has no application because this claim has nothing to do with any breach of warranty under the Act. Clause (c) has no application because it has nothing to do with any major structural defect.

The Applicants are persons who entered into a contract with a vendor for the provision of a home. They may well have a cause of action in another place against the vendor for damages for breach of contract. The question, however, is whether this is "a cause of action for financial loss resulting from....the vendor's failure to perform the contract. Clearly, the reference to bankruptcy of the vendor has no application here.

The Tribunal was referred to two authorities by counsel for the Program which dealt with this second question. See the case of Gene and Mavis Legacy (1991) 22 CRAT 790 at p.796 where the Tribunal quotes section 14(1)(a) of the Act and goes on to say:

Neither counsel referred the Tribunal to any decision dealing specifically or precisely with this issue nor have we found one which does so. A key word to be considered is the word "person" used at the beginning of clause (a) and it must have been intended by the Legislature that there be a distinction between this use of the word "person" and the use of the word "owner" in section 13 and in clauses (b) and (c) of section 14(1). It is an owner which is the beneficiary of the warranties established in section 13 and in clauses (b) and (c) of section 14(1). An "owner" is defined clause (g) of section 1:

- (g) "owner" means a person who first acquires a home from its vendor for occupancy, and his successors in title;

Vendor for this purpose is defined in clause (n) of section 1 as follows:

- (n) "vendor" means a person who sells on his own behalf a home not previously occupied to an owner and includes a builder who constructs a home under a contract with the owner;

This definition contemplates an owner acquiring a home from a vendor or his successor in title and, therefore, contemplates acquiring the title.

A purchaser who has closed his transaction and become an owner within these provisions can put forward any claim under section 13(1) or under section 14(1)(b) or (c). However, a purchaser under an Offer of Purchase and Sale who is not able to close his transaction because of the bankruptcy of the vendor or other failure on his part to perform the contract because a house is not built or for some other reason cannot make any recovery under these provisions.

It is the opinion of the Tribunal that, when all of these provisions are read together, it was the intention of the Legislature in section 14(1)(a) to provide a basis for the recovery of certain losses or damages suffered by a person who could not recover under section 13(1) or section 14(1)(b) or (c), namely, a person who had not been able to close his transaction as a result of one of the stated failures of the vendor and that section 14(1)(a) applies only to claims put forward by persons who have not been able to close their transactions and, therefore, cannot put forward claims as owners as defined in the statute. This conclusion is corroborated or supported by the words of Mr. Hart in the article quoted above where, in dealing with warranty claims he

says that "when the purchaser takes title and becomes an owner, there are six areas of warranty coverage...for which claims can be made."

The reference to the article by Mr. Hart is explained earlier in the judgment at p.795 in the passage:

Counsel referred to a document published on May 14, 1990 by the Canadian Bar Association as part of its Ontario Continuing Legal Education which was a paper prepared by Mr. W.R. Hart, Regional Manager of the Ontario New Home Warranty Program in which he stated under the heading "WARRANTY CLAIMS"

When the purchaser takes title and becomes an owner, there are six areas of warranty coverage during the 5-YEAR period from date of possession for which claims can be made.

- (b) Completion of missing or incomplete work shown in the Purchase Agreement, to a maximum of \$5,000.00 or 2% of the purchase price, whichever is greater.

This is simply a restatement of the Regulation above mentioned in Section 6(7). The claim must first come within an established or prescribed liability of the Program before the question of placing a limitation upon it arises.

See also the case of Yi Lu and Pei Wen Dong, a decision released on June 29, 1994. This was a case where Applicants alleged and proved that a condominium which they purchased and received was 20 square feet in area less than that stipulated in the Offer of Purchase and Sale and the plans and specifications forming part thereof. At page 2 of the decision, the Tribunal states:

As aforementioned, these facts are clearly established and are accepted by the Respondent. The issue which must be determined by the Tribunal is whether, upon these facts, the Applicants can make a recovery from the Program. To succeed,

the Applicants would have bring their claim within some part of Section 14(1) of the Ontario New Home Warranties Plan Act:

The Tribunal then quotes section 14.(1) of the Act and goes on to say:

Section 14(1)(a) clearly has no application because this is not a case where there is a cause of action against a vendor for financial loss resulting from bankruptcy or failure to perform a contract.

The same conclusion was reached on this point in the case of David Chalker (1991) 22 CRAT 586. After quoting section 14(1)(a) of the Act, the Tribunal says at the top of page 589:

We point out, however, that the section refers to a person who had entered into a contract and Mr. Chalker could no longer be brought under that section since the moment he closed the transaction, he became an owner.

Support for this conclusion can be found in the wording of section 16 of the Act. In all four subsections thereof, the words "person" and "owner" are used with the disjunctive "or" joining them indicating that, as contemplated by the Legislature in this context, these words describe two different things.

A different view has been expressed by the Tribunal in other cases. See the case of R.A. Hunt (1991) 22 CRAT 733. In this case, an owner of land had engaged a contractor to build a new home upon it for him. The owner sustained certain losses by reason of the failure of the contractor to do certain things required of him, but these losses were not the result of breaches of warranty as defined by the Act or any major structural defects. In this case, the Applicants was always a "owner" of the land and of the house to be constructed. It was argued on behalf of the Program that he was not, therefore, a person within the meaning of section 14(1)(a) and at page 736, the Tribunal says:

The Applicants argued that while it is true they are an owner under the terms of the Act, they are also a person which is not a defined term and that section 14(1)(a) of the Act is much broader than clauses (b) and (c), in that it would

encompass not only a person who fails to become an owner, but would also encompass an owner since they are persons who have entered into a contract with a vendor. If that, in fact, is the case, then the Applicants would have a claim under clause 6(1) of the Regulations if they could show a financial loss.

The Tribunal is of the view the position of the Applicants is correct and that if the Applicants could have shown that they had suffered financial loss, their claim for this item would have properly been allowable. In any event, the Program acknowledged at the hearing before the Tribunal that they would accept this claim.

It must be noted, however, that this reasoning in the Hunt decision is obiter dicta. In the result, however, the Tribunal disallowed the claims by the Applicant, Mr. Hunt and the decision is not therefor an authority of the Tribunal for the proposition quoted.

The case which I have been able to find which is of the most assistance is the case of Steve Stathakis (1979) 8 CRAT 74. At page 74, the Tribunal says:

In October, 1976, the Applicant entered into an oral agreement to purchase from Cosenza Homes, 51 Larwood Blvd. for the sum of \$135,000. The Applicant claimed to have made during the construction the following payments as deposits to the builder:

March 3, 1977	\$25,000.00
November, 1977	5,000.00
January, 1978	8,000.00
February, 1978	4,000.00
March, 1978	3,500.00

The evidence of payments consisted of two receipts and endorsements thereon. One of the items was a receipt dated March 31, 1977 for \$25,000 made out to Applicant signed by one, Jose Sara, the principal for the builder, Cosenza Homes. The

receipt was typed out and had the following notation:

"For new House-51 Larwood Blvd., Scarborough	
Full amount:	\$140,000.00
Less:	25,000.00
Balance	115,000.00

"

On June 1st, 1978 a written Agreement of Purchase and Sale was executed with Applicant as purchaser and Cosenza Homes Ltd. as vendor. No monies were paid thereunder.

Before the transaction was completed the existing mortgagees, five of them, proceeded with sales proceedings and they were about to sell the property. The Applicant, because he had already moved into the premises, agreed to purchase from the said mortgagees, the property for the sum of \$135,000. The transaction was completed. At that time the Applicant received from the principal, Sara, a promissory note for \$20,000.

The Applicant was determined to acquire the home. He was very forceful in his position that he wanted the house even though it would likely cost him more than he had originally agreed. At this time, Cosenza Homes Ltd. was prepared to give the Applicant a promissory note for the sum of \$40,000 and it appeared that Cosenza Homes Ltd. would be going into bankruptcy.

The Tribunal stated:

On behalf of the Applicant it was submitted that \$40,500 had been paid as deposits through Joe Sara under an oral purchase agreement with Cosenza Homes Ltd. which had failed to perform the contract, that he, the Applicant, had received a promissory note for \$20,000 and that accordingly his financial loss was \$20,500 so that he was entitled under Section 14(1) of the Act to the limit of \$20,000 set out in Regulation 6, subsection (1).

Section 6(1) of Ontario Regulation 892 made pursuant to the Ontario New Home Warranties Plan Act states:

6(1) A purchaser who has a claim under clause 14(1)(a) of the Act in respect of a purchase agreement entered into after the 30th day of June, 1988 is entitled to be paid out of the guarantee fund an amount for damages arising from the breach of the agreement by the vendor that does not exceed \$20,000.00.

To succeed with their claim here, the Applicant must bring it within this Regulation.

The judgment of the Tribunal in the Stathakis case goes on to list seven submissions on behalf of the Program, the seventh of which reads:

7. The Applicant had become an owner and accordingly was not, under Regulation 6 subsection (1) entitled to be paid out of the guarantee fund.

The outline of the facts goes on to set out that eventually the vendor/builder became insolvent and a mortgagee or mortgagees took possession and sold the property under Power of Sale to the Applicant. At page 79, the Tribunal deals with the point with which we are concerned here and says:

The Tribunal is of the opinion that having 'become an owner' of the home, the Applicant (purchaser) herein is not entitled to be paid out of the guarantee fund under the limitation of Regulation 6(1).

It was submitted on behalf of the Applicant that since the Applicant had not become an owner through the purchase agreement with Cosenza Homes Ltd, but through a separate agreement with a mortgagee, the restriction of Regulation 6(1) is not applicable. The Tribunal does not agree with that submission.

In conclusion on page 80, the Tribunal says:

The Tribunal is of the opinion that intent

of the Ontario New Home Warranties Plan Act and Regulations thereunder was (1) to grant to a home buyer certain warranties when he became an owner or (2) to protect a home buyer from loss in respect of monies coming within the meaning of "deposits" when he did not become in fact, an owner. The Tribunal is of the opinion that the submission on behalf of the Applicant makes the words "who does not become an owner" superfluous or requires the addition of the words "under a purchase agreement with the vendor". It is clear that within the section as written the Applicant became the owner of the home in issue and is not entitled to claim under the section and accordingly under the Act."

The Tribunal agreed with the decision of the Respondent and ordered the Corporation not to pay the claim of the Applicant.

This is a clear decision that once a person who has entered into a contract with a vendor to acquire a home closes his transaction and becomes the owner thereof, he can no longer make a claim upon the fund under section 14(1)(a) of the Act for any monies which he might claim under section 6(1) of the Regulation aforementioned and is restricted to claims he may have under clauses (b) and (c) of the subsection.

An appeal was taken from this decision to the Divisional Court of the Supreme Court of Ontario which was heard on May 19, 1983. The judgment, found in (1992) 19 CRAT SCO Decisions and Orders at p.158, was given by Smith J. as follows:

In this matter we are all agreed that the application should be dismissed.

The applicant argues that the Board adopted a definition of the word "owner" as used in Regulation 6(1) passed pursuant to the Ontario New Home Warranties Plan Act, that it could not reasonably bear. The definition of "owner" which is found in section 1(g) of the Act means a person who first acquires a home from its vendor for occupancy and his successors in title and a vendor is defined in section 1(n). It means a person who sells on his own

behalf a home, not previously occupied, to an owner and includes a builder who constructs a home under a contract with the owner.

The mortgagee in this case was a vendor, albeit not a registered one, and accordingly the purchaser became an owner and was disentitled to claim by reason of Regulation 6(1). The Board, in the result, did not place an interpretation on the word "owner" which it could not reasonably bear.

The second questions which I posed in the first paragraph hereof must therefore be resolved in favour of the respondent Program.

Therefore, by reason of the authority vested in it by section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow this claim.

KEITH KORNACKI

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE ONTARIO
NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JUDITH A. KILLORAN, Chair, presiding
GURDIAL SINGH FIJI, Member
SAUL MERRICK, Member

APPEARANCES:

GARTH LITTLE, representing the Applicant

BRIAN M. CAMPBELL, representing the Ontario
New Home Warranty Program

DATE OF
HEARING:

17 December 1993

Toronto

REASONS FOR DECISION AND ORDER

Mr. Kornacki appeals the decision of the Ontario New Home Warranty Program dated June 25, 1993 to deny him compensation for a claim based on persistent water leakage into his basement.

Mr. Kornacki purchased a new home in Tecumseh from Roko Construction Limited, a builder registered with the Program. The date of possession as shown on the Warranty Certificate is January 12, 1990.

On May 1, 1990, Mr. Kornacki wrote his first letter to the New Home Warranty Program complaining of four cracks in his basement floor, ranging from four to fifteen feet long. A letter from Mr. Kornacki to the Program dated June 8, 1990 listed five further complaints.

On July 26, 1990, Mr. Kornacki submitted a Request for Conciliation Form to the Program. The Conciliation Report from the Program dated September 25, 1990 found six items to be warrantable under the terms of the Ontario New Home Warranties Plan Act. The six problems which the builder was required to remedy were:

- 1) Water leaking into basement below front window;
- 2) Water leaking into basement below grade door;

- 3) Siding buckling;
- 4) Garage overhead door not painted;
- 5) Cleaning of face brick; and
- 6) Front entrance north side - face brick not installed.

A further complaint letter dated October 10, 1990 was sent by Mr. Kornacki to the Program about water leaking down the fireplace stack into the basement and missing extensions to the down troughs. A Request for Conciliation form dated November 7, 1990 followed as did a Conciliation Report dated November 27, 1990.

There have been a number of complaint letters from Mr. Kornacki over a long period of time. These complaints have been the subject of repairs first by the builder/vendor, then by Ray-Novations Construction Ltd. and finally, by Dura Craft Homes Limited. Re-inspections of the Kornacki residence by the Program took place on May 14, July 10, November 26, and December 17, of 1991 and June 14, 1992, January 14, 1993 and finally, June 23, 1993.

As is evident from the above history of events, the Tribunal heard considerable evidence about the problems experienced by Mr. Kornacki with his new home. However, the Tribunal was restricted to considering the one unresolved issue which was that of water leakage into the basement along the walls of the family room.

Dr. N.K. Becker was retained by Mr. Kornacki to prepare an engineer's report dated April 7, 1993. The purpose of his investigation was to determine the cause of chronic leaks into the basement. Dr. Becker inspected the house on March 25, 1993 and noted some moisture stains at both corners of the easterly wall base where the carpeting was loose.

Dr. Becker's evidence was very helpful to the Tribunal. He spoke knowledgeably about the methods necessary to keep a basement dry and noted that a failure in any one of the requirements could subvert their collective purpose of maintaining dryness. He recommended that:

- 1) All of the brick veneer be removed and replaced;

- 2) Test excavations be dug at the four outer corners of the house to check the exterior damproofing and to test the footing tile system;
- 3) The eavestrough and downspouts be reconfigured and/or relocated to prevent the accumulation of roof water against the foundation walls;
- 4) Additional topsoil be graded around the house to prevent surface water accumulation around the foundation.

Mr. Doug Irvine, a Warranty Representative for the Program, gave evidence concerning his reinspection of the Kornacki residence on January 15, 1993. In his letter dated January 18, 1993, he noted that when the home was inspected from the interior, the carpet was pulled back and there was no evidence of any water stains on the floor, underpad, or carpet tacking along the floor, nor were there any water stains on the newly installed drywall and baseboard in this area. However, since Mr. Kornacki claimed that water entered the basement on November 12, 1992 and January 4, 1993, the Program agreed to carry out further water testing.

Mr. Kornacki sent a letter to the program dated January 27, 1993 that water had entered the north east front elevation of the basement on January 22, 1993. He filed an affidavit taken from Ms. Denise A. Crow, a neighbour that she had witnessed water entry along the east and north walls of the family room on November 12, 1992 and again on January 22, 1993. However, Ms. Crow did not appear before the Tribunal to give evidence or to be cross-examined on the information contained in her affidavit.

Water testing was conducted at the Kornacki residence on June 23, 1993 at the front entry, front elevation wall and side wall adjacent to the chimney area. The evidence of Mr. Kornacki and Mr. Irvine was in agreement that there was a fifty minute full force water application to the front entry, front and side walls of the house and that there was no evidence of water entry to the areas in question. Photographs were submitted in evidence documenting that the areas were dry prior to the water test and following.

Mr. Irvine testified that it was his opinion that the family room and carpet might be subject to minor humidity or condensation dampness as this is not uncommon for basements or areas below grade. He noted a slight mildew odour from the carpet but no staining on the concrete floor, carpet tacker board, underpad or back of the carpet area. He commented that it was

unusual, considering the amount of recent rain that there were no signs of dampness, such as staining of any of the materials. These observations were contained in the decision letter dated June 25, 1993 from the Program as was the observation that excessive water could have ponded against the foundation due to: settlement of the grade along the front foundation wall, as well as at the area on the side wall near the chimneys, and the position of three downspouts.

Mr. John Nehmatallah of Dura Craft Homes Limited also testified on behalf of the Program. He did extensive remedial work on the Kornacki residence in May of 1992. At the conclusion of his work, he conducted a 20-25 minute water test and saw no evidence of leakage. His testimony conflicted, in some respects, with that of Mr. Becker. Although Mr. Becker claimed there were insufficient weepholes and an absence of flashing, Mr. Nehmatallah recalled observing adequate weepholes and flashing when he did his repair work. While Mr. Becker claimed that there were infractions of the Ontario Building Code, Mr. Nehmatallah testified that there was compliance with the Ontario Building Code.

There was agreement among all the witnesses that the leakage problems could be due to lack of proper grading and water directed by the downspouts to collect at the foundation of the residence. Remedying these problems is the responsibility of the homeowner as dictated by section 13 (2)(f) and (h) of the Act.

Mr. Kornacki applied for compensation under sections 13 (1)(a)(i) and (iii) and section 14 (1)(b) of the Ontario New Home Warranties Plan Act. Although the Tribunal had considerable sympathy for Mr. Kornacki in light of the problems he faced over a long period of time, it was mindful that the burden of proof rested with him to establish damages. The Program's evidence was that there was no leakage subsequent to the extensive repairs authorized by it. Although the evidence of Mr. Kornacki and his witness conflicted with that of the Program, it was not sufficient to discharge the burden of proof in Mr. Kornacki's favour. For example, Mr. Kornacki filed no photographs to counter the photographs filed by the Program showing his basement to be dry. As well, his witness, Dr. Becker, admitted that no test excavations were done to determine whether his theories about the source of the leakage problem were correct.

Accordingly, by virtue of the authority vested in this Tribunal under section 16(3) of the Ontario New Home Warranties Plan Act, the Ontario New Home Warranty Program is directed to disallow the claim.

MR. AND MRS. JOSEPH LAVEE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
GURDIAL SINGH FIJI, Member
EDWARD WEISZ, Member

APPEARANCES:

JOSEPH LAVEE, appearing on their behalf

STEPHEN AUSTIN, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 16 August 1994

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal by the Applicants, from a decision of the Ontario New Home Warranty Program, set out in a decision letter dated August 10, 1993. There is a history here of some length of involvement of the program with the house in question here. On February 4, 1988, the Applicants entered into a contract with Morra Custom Homes Limited, to purchase for \$700,000.00, a new home to be built at 15 Aneta Circle in North York. The contract provided for the closing of the transaction on August 30, 1988 and it was in fact closed on that day.

On August 24, 1989, the Applicants sent a letter to the builder with 24 listed deficiencies in their house and sent a copy to the Program, which received the same on August 25, 1989. This was within the one year required by section 13(4) of the Act. This list did not include any of the complaints with which we are concerned at this hearing. The Program dealt with this by its regular procedure, a conciliation meeting was held on December 19, 1989 and a report issued on February 20, 1990, with a Schedule "A(1)" outlining a list of items which the Program found to be warrantable and a Schedule "A(2)" with a list found not to be warrantable.

The owners were not satisfied with the response of the builder and asked for a re-inspection which was held on July 17, 1990 and a further report was issued on September 13, 1990 dealing

with all warrantable items. On January 4, 1991, the owners again complained that repairs were not completed by the builder and another re-inspection meeting was held on March 25, 1991 and another report issued on April 3, 1991, dealing with the warrantable items. For most of them, it was stated that the problem had been rectified, but at least three remained to be completed. On April 8, 1991, the Program wrote the owners stating:

This letter shall act as confirmation that all items as listed in our reconciliation reports Schedule A(1) dated December 19, 1989 have now been completed. This was confirmed in your telephone conversation with Rob Rosset on April 4, 1991.

At the hearing, Mr. Lavee complained that the Program did not do what it should have done with regard to these complaints, but he did acknowledge that he got this letter and did not respond by taking any issue with its contents.

On March 16, 1992, Mr. Lavee wrote again to the Program advising of a structural defect in the house, being a crack in the roof and the ceiling which resulted in water getting in. The Program sent the Applicants a Proof of Claim for a major structural defect, which they returned on April 6, 1992 and the Program received it on April 9, 1992. The Program arranged a major structural defect inspection which took place April 29, 1992. A major structural defect report was issued and on April 30, 1992, a decision letter was issued denying the claim. The Applicant said at this hearing that he did not agree with this decision, but he did not appeal it.

On June 14, 1993, Mr. Lavee again wrote to the Program with a claim for another major structural defect in the following words:

Please be advised that "Major structural defect" has developed in our house.

According to clause (b) of subsection 1, of section 13 of the Ontario New Home Warranties Plan Act, "chemical failure of materials", we would like to report to you the following:

1) Disintegration of the bricks at the window sill of the living room.

2) Mortar between bricks, in numerous areas of the house, getting loose, which results in visible cracks appearing between the bricks.

(tab 9, Exhibit 4)

The Program received this letter by fax the same day. A Proof of Claim was forwarded and completed by the owner and returned to the Program on June 21, 1993. Another major structural defect inspection was arranged for July 26, 1993. Mr. Bruce Stephens, a technical representative with the Program attended and conducted the inspection and issued a report on July 29, 1993. In this report he states:

COMPLAINT:

1) Disintegration of the bricks at the window sill of the living room.

2) Mortar between bricks, in numerous areas of the house, getting loose, which results in visible cracks appearing between the bricks.

OBSERVATION: For the purpose of this report, the front of the home faces north.

1) The home owner indicated the spalling condition of 13 bricks which forms part of the north centre brick window sill of the living room. There was no evidence of this condition occurring on the other two angled window sills or to the vertical brickwork below on this window projection. There were some vertical shrinkage cracks in the mortar of the sills. Separation has occurred in the caulking along these sills which may allow water to become absorbed into the front brick sill. During a freeze/thaw cycle and with the moisture in the bricks, this would cause this condition.

2) The homeowner indicated various areas around the home where minor pieces of mortar have dislodged from the joints. This condition was not found excessive and was found at the areas where hairline

cracks occur in the brickwork. These areas are as follows: vertical mortar joints at the front entrance where the homeowner installed iron gates to the brickwork, over the two garage doors, the quoining at the north west front corner, outside corners of the rear angled bay (stacked joint) & east elevation at the south corner.

These conditions viewed were found to be minor and not considered excessive.

There was 1 brick on the south west main floor window and the south west bay window brick sills exhibiting a hairline crack in the face of the brick. This crack may have happened during the firing process of the brick at the time of manufacturing.

The homeowner also indicated various areas where he felt the mortar was soft. My inspection found that the point of my pocket knife could only be inserted into the mortar approximately 1/16" in a small number of areas. I found the mortar to appear to have adequate strength and would not agree with the homeowner that it was soft.

The homeowner further demonstrated how the face of the cast in place cement threshold could be removed at the west elevation garage main door. Some spalling has occurred to the bricks behind this section of cement below the threshold. The tread area of the threshold is still in solid contact to its base.

The decision letter to which reference is made above is based upon these findings and states:

It is the decision of the Ontario New Home Warranty Program, that the defects addressed at the inspection by Mr. Stephens do not constitute a Major Structural Defect.

There were no defects in material or workmanship resulting in the failure of a load bearing portion of your home, and no Building Code infractions observed. There was nothing Mr. Stephens observed that indicated a structural failure.

Brick veneer in itself is not considered structural, and will not affect the structural integrity of a home. The spalling condition noted in some of the bricks is likely caused by thermal expansion and contraction together with seasonal weather conditions, over a period of time. During a freeze/thaw cycle any moisture in the brick work would expand when frozen and may cause cracking in the mortar and spalling of the face of the brick. Exterior caulking requires maintenance by the homeowner on a regular basis, and new caulking installed as and when necessary to ensure a good seal is maintained.

The areas where small pieces of mortar had chipped off were considered minor in nature, and not excessive. The crack in the face of the brick may well have been occurred during the firing process of the brick at the time of manufacture.

Based on Mr. Stephens investigations it would appear that the mortar strength appeared adequate and not excessively soft.

It is from this decision that this appeal is taken.

At the hearing, Mr. Lavee gave evidence that the chemical composition of the mortar was improper and had failed, and caused the mortar to deteriorate. He produced a number of photographs showing areas in the brick work where the mortar had come loose and fallen out or was cracked and he produced pieces of bricks which had come apart in layers like shale and pieces of the mortar which had come loose from the walls. He did not produce any expert evidence or indeed any evidence but his own to the effect that there was anything wrong with the chemical composition of the mortar.

Mr. Bruce Stephens gave evidence for the Program. He said that he found no failure in the brick work or mortar which he said resulted from any defects in material or workmanship or any breach on the Ontario Building Code. He said, he could see no evidence of any chemical deficiency in the mortar and said that in his opinion the damage to the mortar and the bricks resulted in the main from water penetration which later froze and caused the results to the brick work. Particularly, was this the case in the area where the greatest damage was done to the brick sill under a window shown in the photographs and to the brick wall under it.

Upon all of this evidence, it appears probable to the Tribunal that the damage was caused by water or melted snow or ice on the flat brick sill getting down into the brick work and freezing and moving the mortar and the bricks and cracking them. While the construction of brick window sills as seen in some of the photographs is acceptable according to the Ontario Building Code, some of the damage caused here as seen in some of these pictures is such that, had it been caused and reported within the year required by section 13(4), of the Act, the Tribunal would probably have found the damage to constitute warrantable defects.

However here to succeed, the Applicants must bring their claim within the definition of "major structural defect" which is found in the first section of Ontario Regulation 892 and which means for the purposes of clause 13(1)(b) of the Act, any defect in work or materials,

- (a) that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or
- (b) that materially and adversely affects the use of such building for the purpose for which it was intended

The section goes on to state that this includes certain things, one being chemical failure of materials, and excludes certain things. However to qualify as a major structural defect, the defect must come within either clause (a) or (b) of this definition.

This issue has been considered by the Tribunal in a good many previous decisions, and we are bound to follow the law laid down. Counsel for the Program relied upon two cases particularly. See the case of Angelo Proestos (1992) CRAT released May 6, 1992,

where the Tribunal says, beginning at the bottom of page 11:

The Tribunal also observes that the claim of Mr. Proestos would not constitute a major structural defect since masonry veneer is specifically excluded as a load-bearing element in section 4.4.6.1(3) of the Ontario Building Code. The New Home Warranties Plan Act specifically states that a major structural defect means any defect in workmanship or materials "that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function".

Masonry veneer brick walls do not constitute, therefore, a major structural element in the home.

This case is quoted with approval in the case of Richard Poonah (1993) CRAT, a decision released June 4, 1993, where the Tribunal says at page 6:

The Tribunal has clearly and unequivocally held in previous decisions that defects in brick veneer walls and houses do not constitute major structural defects. (See Angelo Proestos case (1992) CRAT released May 6, 1992. At the bottom of page 11:

The Tribunal then quotes the above passage from the Proestos case and goes on to say:

Upon the facts established by the Applicant here and in particular the findings of Mr. Vandermey as set out in the second paragraph of the decision letter of December 5, 1991 and the evidence of Mr. Pal, it should be pointed out that the Applicant may have good claims against other parties. However, this is a question upon which he should obtain proper advice. The Tribunal at this hearing, is confined to adjudicating upon the rights and obligations between the parties hereto, the Applicant and the Program.

It is clear that none of the complaints of the Applicants concerning the mortar and the brick work in these walls, or the defects if they be defects which would have been warrantable if reported within the first year, resulted in any failure of the load-bearing portion of the building or materially or adversely affected its load-bearing function; nor do they materially or adversely affect the use of the building for the purpose for which it was intended, namely for the Applicants' family to live in.

Therefore, pursuant to the authority invested in it by section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow this claim.

NYLE J. LICHTI

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, presiding

APPEARANCES:

N.J. LICHTI, appearing on his own behalf

BETH SYMES, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 21 June 1994

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from a decision of the Ontario New Home Warranty Program set out in a decision letter to the Applicant dated January 31, 1994. The Applicant's claim is for the return of a deposit of \$20,000 paid upon an Offer of Purchase and Sale for a condominium unit being unit 202 in a condominium apartment building being constructed by the vendor/builder Beach Place Development Inc. in Grand Bend, Ontario.

The project manager of the development was a limited company JCL/Baxter Inc. in which the principal shareholder and directing manager was one Robert Baxter who was said to be a professional engineer. The Applicant, Mr. Lichti, worked for this company when it began to build this building in 1990 and performed the duties of construction superintendent of the project. On August 7, 1990, a cheque was issued by JCL/Baxter Inc. for \$20,000, signed by Robert Baxter and payable to Beach Place Development Inc. On the face of this cheque is a notation: "Downpayment unit 206".

On September 18, 1990, Robert Baxter and one Darryl Gueguen, who was the contractor who did the mechanical work in the building entered into an Agreement of Purchase and Sale with Beach Place Development Inc. to purchase unit 202 for the sum of \$245,000. This agreement called for a deposit with the offer of \$20,000 and the evidence was that the parties agreed that the aforementioned cheque for \$20,000 (which the back of the cheque shows was negotiated on July 10) should be taken and applied as this deposit although referring to another unit.

In the meantime, Mr. Lichti wrote a cheque on August 7, 1990 for \$20,000 payable to Robert Baxter which cheque was also negotiated on the same day. Mr. Lichti said that he gave this money to Mr. Baxter for the purpose of buying an interest in JCL/Baxter Inc.

It was the evidence of Mr. Lichti that before November 1, 1991, he and his wife entered into some agreements for the purpose of taking over and purchasing unit 202 in the building. He said that one of these agreements was a new Agreement of Purchase and Sale negotiated with Beach Place Development Inc. for Mr. and Mrs. Lichti to purchase this unit for the sum of \$190,000. No copy of this document was produced at the hearing. He said that its terms and conditions were similar to those contained in the Offer of Purchase and Sale by which Baxter and Gueguen purchased this property, a copy of which is at tab 1 of Exhibit 5. He said that he paid no deposit with the offer. He did agree to pay a monthly occupation fee and this was calculated at \$1,969.08 pursuant to a formula set out in the offer. This result would follow from the provisions for this calculation found in the Offer of Purchase and Sale at tab 1 of Exhibit 5 and so there is a fair inference that the second offer between Beach Place Development Inc. and Mr. and Mrs. Lichti contained a similar provision.

Mr. and Mrs. Lichti went into possession on November 1, 1991 and Mr. Lichti provided a cheque dated that day to the solicitors for Beach Place Development Inc. for \$2,159.63 being the first month's occupation fee plus a small additional amount for some item or items which were not identified. He also provided post-dated cheques up to May 1, 1992, but these were not cashed. They were replaced with other cheques payable directly to Beach Place Development Inc. Cheques for the same amount on December 1, 1991 and January 1, 1992 were paid and then from February 1 to May 1, cheques for \$1,827.43 were paid. The amount was reduced because the interest on the mortgage on the building was coming down.

After May 1, 1992, the Applicant paid no more occupation fees because he said the building was not finished, the amenities for which he was paying were not provided and the vendor was in financial trouble and he had no idea what would be the result of all of this. Beach Place Development Inc. continued to demand the occupation fee from Mr. Lichti, but the amount came down again because of the reduction in interest rates. For October 1992, a notice sent to Mr. Lichti demanded an occupation fee of \$1,579.50. The only sum which Mr. Lichti did pay after May 1, 1992 was the sum of \$649.50 paid on account of some real estate taxes.

At the time Mr. Lichti entered into the Agreement of Purchase and Sale with Beach Place Development Inc. to buy the unit

for \$190,000, he also entered into agreements with Baxter and Gueguen pursuant to which they acknowledged that they had no further interest in the property. Mr. Lichti said that he paid Gueguen \$10,000 and acknowledged to Baxter that \$10,000 of the \$20,000 he had paid to him in August would be used to cover his share of the original deposit.

As aforementioned, Beach Place Development Inc. encountered more and more serious financial trouble and on May 28, 1992 in a Construction Lien Action in which there were many claimants, upon the motion of the Royal Bank, Messrs. Peat Marwick Thorne Inc. was appointed as trustee of the development and instructed to act as a receiver and manager of it. Several further Court Orders were issued and finally on June 3, 1993, an Order was issued to the effect that all outstanding Offers of Purchase and Sale of units in the building with a few exceptions, of which unit 202 was not one, should be terminated without prejudice to whatever claims the parties might have against one another otherwise. All purchasers who had occupied these units as Mr. Lichti had done, again with a few exceptions of which he was not one, were ordered to give up vacant possession by June 11, 1993. The only way that one of these persons could stay in his unit thereafter was to negotiate a new agreement with the receiver manager. Mr. Lichti did not do that.

Based upon the foregoing, the Tribunal must now determine whether the Applicant is entitled to recover the \$20,000 claimed in his Proof of Claim filed with the Program on August 10, 1993. It was claimed by way of an initial deposit paid on August 27, 1990 (see tab 13 of Exhibit 5). In its letter of January 31, 1994, the Program responded:

As a result, we wish to advise that your claim in respect to Section 14(1) of the Ontario New Home Warranties Plan Act is deemed to be valid.

However, upon consideration of Section 14(1) of the Act, it is the decision of the Program to set-off the claim in the amount value of the period of time in which you continued to occupy the property without making payments of interim occupancy fees pursuant to the Agreement of Purchase and Sale.

It is our understanding that you took the place of the original "purchaser", Robert Baxter and Darryl Gueguen, by way of payment to the party of \$20,000.00, which

has been acknowledged by the Vendor as an "Equity Transfer" in an Agreement dated October 20, 1991.

On the basis of the original Agreement of Purchase and Sale you accepted occupancy of the property on November 1, 1991 and vacated the property on June 1, 1993. During this period you have submitted evidence that you made payment of interim occupancy fees for the period November 1, 1991 to May 1, 1992. During the period June 1, 1992 to May 31, 1993, you have provided evidence that you made to the receiver Peat Marwick in the amount of \$649.50.

Therefore, the Program calculates the benefit which you have received during the period from June 1, 1992 to May 31, 1993, as to:

12 Months @ \$1,969.08 totalling \$22,428.96
Less \$649.50, for a total of \$21,779.46

As such, the Program finds that your "rent free" benefit exceeds the maximum allowable claim for deposit as prescribed by the Ontario New Home Warranties Plan Act which is \$20,000.00.

In conclusion, the Program asserts that even though it accepts your claim under Section 14(1) the set off provision under Section 14(2) has determined that no funds are owed to you as a result of this claim.

There are two issues to be determined:

1. Does the Applicant have a claim against the Program for \$20,000 pursuant to section 14(1)(a) of the Ontario New Home Warranties Plan Act?

2. If the answer to the first question is in the affirmative, is the Program entitled to set off against that claim the amount of the occupation fees payable by and not paid by the Applicant as being of benefit within the meaning of section 14(2) of the Act?

The relevant parts of the section read as follows:

14-(1) Where,

- (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

.....

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

- (2) In assessing damages, the Corporation shall take into consideration any benefit, compensation or indemnity payable to the person or owner from any source.

Dealing with the first question, I question whether the Program would have conceded as it did in its letter of January 31, 1994, that the claim for the \$20,000 was a valid one if it had had all of the facts which came out at this hearing. There is no doubt that the Applicant was a person who entered into a contract with Beach Place Development Inc. for the provision of a home, namely unit 202 in the building and that the vendor failed to perform the contract. If this had been a simple case where the purchasers had entered into their contract and paid the \$20,000 deposit to the vendor at that time, the Applicant would have succeeded on this point. However, the Applicant paid no deposit to the vendor with the Offer of Purchase and Sale which became the contract to purchase this unit for \$190,000. Therefore, the Applicant cannot have lost the \$20,000 by reason of the failure of the vendor to perform this contract and this was the only contract he had with the vendor. It is true he had contracts with Baxter and Gueguen whereby he gave each of them consideration of \$10,000, but there was no breach of these contracts on the part of either of them.

If Mr. Lichti had simply proceeded to purchase their interests as purchasers in the original Agreement of Purchase and Sale from Baxter and Gueguen and taken an assignment of this interest, then the situation would have been quite different. He would then have been entitled to all of the rights and interests which they had including the right to pay the balance of the purchase price of \$245,000 in accordance with the terms of the agreement and close the transaction and get title and the right, in

the event of the failure of the vendor to perform and of the Court Order terminating the agreement to recover back the \$20,000.

On the evidence before me, I find as a fact that the rights which the Applicant had were not as such an assignee of the contract with Baxter and Gueguen, but rather as a purchaser in the second Offer of Purchase and Sale between himself and his wife and Beach Place Development Inc. to buy the unit for \$190,000. The last piece of evidence which Mr. Lichti gave was that when he and his wife moved in and paid the \$2,159.61 cheque on November 1, 1991, they did so pursuant to their contract to buy the unit for \$190,000.

On this basis, I must find that the Applicant has failed to bring his claim within section 14(1)(a) of the Act. I should, however, also deal with the second issue in the event that it should be determined that my conclusion on the first point is not correct.

On the second point, I should note first that counsel for the Program said that, "It is impossible to tell upon the evidence we have exactly what the occupation fee should have been for the whole of the 12 months during which the Applicant had possession and paid no fees save for the \$649.50 as aforementioned." She said that the Program would be content to have this calculated at the lowest amount of \$1,579.50 per month which would total \$18,954.00 which, less the \$649.50 paid, leaves an amount to be offset of \$18,304.50.

It is my conclusion that, in the event the Applicant were entitled to recover the \$20,000, the Program would be entitled to offset this amount of \$18,304.50. From the cases cited to me of Valiallah (1980) 9 CRAT 87, Genning in 1992 and O'Brien in 1994, it is clear that occupation fees as we have here which are payable by a purchaser who takes possession which are not paid constitute a benefit payable to the owner within the meaning of section 14(2) of the Act. It is also clear that the calculation of these fees are a matter of contract between the parties and not an assessment of value on some other basis and these fees are calculated here pursuant to the contract.

Therefore, even if the Applicant had been entitled under section 14(1)(a) to the return of his \$20,000, the sum of \$18,354.50 should have been deducted from it and he would have recovered only \$1,695.50.

In the result, pursuant to the authority vested in it by section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow this claim.

YI LU AND
PEI WEN DONG

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding

APPEARANCES:

YI LU, appearing on their behalf

BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 25 May 1994

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from a decision of the Ontario New Home Warranty Program set out in a letter from the Program to the Applicants dated November 30, 1993. The facts are not in dispute; in fact, the Respondent called no evidence and accepted the facts as established by the Applicants. There remained a single issue to be determined - what, if any, recovery can the Applicants make in these proceedings from the Program based upon these established facts?

On or about July 21, 1992, the Applicants entered into an Agreement of Purchase and Sale with Garden Terrace Developments Inc. to purchase a penthouse condominium in an apartment building at 955 O'Connor Drive in Toronto for \$100,000. Attached to this Offer was a Schedule "D" which specified the area of the unit to be 1,000 square feet and set out a floor plan of the unit. The transaction was closed and the Applicants moved in about November 1, 1994. When they moved in, the Applicants discovered that the unit was smaller by 20 square feet. Page 11 of Exhibit 8 shows an area of this size at the top right corner of the floor plan marked "NP" (not part of the unit) which was taken out of the area of this unit and is part of the hallway on that floor.

A Surveyor's Certificate, a copy of which is page 10 of Exhibit 8, certifies that the floor area of this unit is 980 square feet which confirms that the unit as delivered to the Applicants was in fact 20 square feet less in area than that for which they had bargained. As a result of this 20 square feet being taken out, the kitchen which is adjacent to this area, is moved that much in

and the reduction in size by 20 square feet is taken off the dining-living room which occupied the rest of the floor area on that side of the unit.

As aforementioned, these facts are clearly established and are accepted by the Respondent. The issue which must be determined by the Tribunal is whether, upon these facts, the Applicants can make a recovery from the Program. To succeed, the Applicants would have bring their claim within some part of Section 14(1) of the Ontario New Home Warranties Plan Act:

14. (1) Where,
 - (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;
 - (b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or
 - (c) the owner suffers damage because of a major structural defect as defined by the regulations for the purposes of section 13, and the claim is made within four years after the warranty expires or such longer time under such conditions as are prescribed,
 the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

Section 14(1)(a) clearly has no application because this is not a case where there is a cause of action against a vendor for financial loss resulting from bankruptcy or failure to perform a contract. This Vendor/Builder did complete the building and deliver the unit to the Applicants on closing as required by the contract. Equally section 14(1)(c) has no application as the complaint here has nothing whatever to do with major structural defects.

Therefore, the Applicants must argue that they come within section 14(1)(b) and that they have a cause of action in damages resulting from a breach of warranty as specified therein. The Applicants argued that the failure to provide the stipulated 1,000 square feet of floor space constituted a breach on the part of the vendor and relied particularly upon the provisions of a Bulletin 22 issued by the Program, a copy of which is found at tab 3 of Exhibit 7.

On page 5 thereof are set out the rules for making floor area calculations for high rise units. No evidence was offered and no argument made as to what legal effect the provisions of this Bulletin should have in a case where the issue might turn upon these provisions. In this case, the issue does not turn upon these provisions and it is therefore not necessary to determine this question. Sufficeth to say, that the best position of the Applicants is that a breach of its provisions constitute a breach of contract on the part of the Vendor/Builder, and even on this conclusion, there is not such a breach here because it is clearly stipulated that "a tolerance of 2% on the total area measurement is acceptable" and 20 square feet is precisely 2% of 1,000 square feet.

However, the Applicants' claim fails on the legal ground that it does not come within the provisions of Section 14(1)(b) of the Act and, therefore, not within the section at all. While the facts appear to establish a breach of the term in the contract to provide 1,000 square feet in the unit, they do not establish a breach of warranty as required in Section 14(1)(b) of the Act. The warranty which must be breached must be a warranty provided in Section 13 of the Act (see the last definition in section 1):

"warranty" means a warranty set out in section 13;

Section 13(1)(a) of the Act reads:

- 13.(1) Every vendor of a home warrants to the owner,
 - (a) that the home
 - (i) is constructed in a workmanlike manner and is free from defects in material,
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code;

The rest of Section 13 is not relevant to this point in issue.

In this case, there is no evidence of unworkmanlike construction or defects in materials, no evidence that the home is not fit for habitation and no evidence of any breach of the Ontario Building Code. Therefore, pursuant to the authority vested in it by Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the claim.

GRANT LYONS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding
SAUL MERRICK, Member

APPEARANCES:

A. DOUGLAS BURNS, representing the Applicant

STEPHEN AUSTIN, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 23 February 1994

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program dated September 29, 1993, to disallow the Applicant's claims. The Applicant alleges that the sum of \$20,000 was paid as a deposit on two homes purchased from a builder named Trillium Building Group (Doug Archer). These alleged deposits were not refunded when the builder was unable to give him clear title to the homes he was to acquire.

The Program argues that the amount given to the builder was not a deposit as envisaged by the New Homes Warranties Plan Act and therefore the Applicant was not entitled to claim the \$20,000 from the fund.

The parties were in essential agreement with the facts established by the exhibits and testimony of Mr. Grant Lyons. Mr. Lyons agreed to buy two properties from the builder Trillium. He made two deposits of \$5,000 each on each of the properties; he made a further payment of \$10,000 on one of the homes when the roof on it was completed.

At some point in the process, the builder began having financial problems and liens were applied against the homes. Mr. Lyons never took possession of the homes because the builder could not give him clear title.

Mr. Lyons testified that he met Mr. Archer on March 23, 1992 when he negotiated the purchase of two homes which were to be constructed. He signed contracts of purchase for each for identical prices of \$125,000. He made a deposit of \$5,000 on each

property. Mr. Lyons stated that he was introduced to Mr. Archer by a very close friend, Ron Graham, who was the owner of all the land on which the buildings in Mr. Archer's development were to be built. Mr. Graham was at that stage an unpaid vendor owed \$200,000. Payment of this amount depended on the project going forward.

Mr. Graham was present together with a Re/Max real estate agent at the negotiating and signing of the two contracts of purchase.

It is to be noted that each of the sales contracts had a special clause written in as clause 9(i) which read as follows:

It is understood by both purchaser and vendor that should the vendor receive another bona fide offer, equal to or better than this offer, than this offer shall be null and void. Said deposits to be returned immediately upon release.

Mr. Lyons testified that he wanted to buy two units, one for his parent's eventual use and the second as a rental unit. He himself did not intend to occupy either home. The two units formed part of a longer project which the builder was attempting to get underway.

Mr. Lyons was asked why clause 9(i) was inserted. He testified that it was added at the suggestion of his friend Graham and the Re/Max agent. But on further examination, Mr. Lyons went on to answer that the purpose of the contracts was to allow the builder Archer to get financing so that the whole of the project could be undertaken. Lyons clearly testified that should another buyer be found for either or both units, his deposit would have been refunded interest free; that is, his \$20,000 would have been tied up in the project earning no income for him. When asked what benefits he was to get therefor from entering these transactions, his answer was that he wished to help his friend by getting the project started.

Mr. Lyons went on to say that his friend Graham monitored the progress on the project for him. At some later point, Graham informed him that there were liens being taken against the builder on the homes subject to the purchase. Lyons waited to see if Archer would be able to sort things out; when he failed to, Lyons made his claim against the Program. He had previously asked for the refund from Archer with no success.

It is to be noted that in the contracts, Mr. Lyons also undertook to pay the enrollment fee to the Program and, as appears

at the end of the contracts, no commission was to be payable to Re/Max even though the contracts indicated that the offers to buy came through vendor's agent Re/Max Escarpment Realty Inc.

Mr. Lyons also stated that if Archer succeeded in selling one of the units he had bought, he would get an upgrade in the carpet for free or perhaps something else of equivalent value. If both units were sold, all he would receive was the refund of his deposits, interest-free.

He reiterated on a number of occasions that the prime purpose of his entering the transactions was to give the builder a chance to get his project going.

It came out clearly in the cross-examination to what degree Mr. Lyons was accommodating both the builder and his friend, Mr. Graham, by the transactions entered into. First of all, he admitted that he borrowed all of the deposit money of \$20,000 paid to the builder from Mr. Graham. He had not yet repaid Mr. Graham, but would so do if he won his case against the Program. He also admitted that by allowing the project to go forward, his friend could finally realize on the amounts owing for the land sold to Trillium. In other words, the payment to Graham depended completely on the project going forward.

Reference was made to two subsequent offers. The Program argues that by virtue of clause 9(i), it was relieved of any responsibility with respect to Mr. Lyons even though Mr. Lyons had not received the refund of his deposits from the builder. It is to be noted that in those subsequent offers, the agent received a sales commission of 6%.

It is clear from Mr. Lyons testimony that the real purpose of the transactions was not for him to become the owner of the homes. This eventuality was recognized as being possible, but was undesired. He testified that should he have had to become owner of the homes, he would have done so. It was clear, nevertheless, that that was the last thing he desired. Mr. Lyons also testified that he never chose the colours, schemes for the house or the rugs or any of the other items that a normal purchaser would be expected to select; nor, did he take an active interest in seeing how the construction of the home proceeded. He admits that he never visited the premises at any point to see what progress was being made.

Stephen Martin testified on behalf of the New Home Warranty Program. In cross-examination, he testified that the Program was never told that Graham had sold the land to Trillium or that Graham had loaned Lyons the \$20,000 to make the deposits. He also testified that it was not typical for the Program to be paid

its insurance in advance; the premium was usually paid on closing. Mr. Martin further stated that the Program had refused the claim because Lyons was not considered to be a person who had entered into a contract for the provision of a home as envisaged by section 14(1)(a) of the Act. The purpose of the contracts between Lyons and the Vendor were really to allow for financing and not to provide a home to Mr. Lyons.

The Program argues that it was relieved of all of its responsibilities towards Lyons when new offers were received by the builder even though Mr. Lyons was not informed of such offers and did not receive reimbursement of his deposits. The Tribunal holds that this did not free the New Home Warranty Program of its obligations to Lyons under the Act. Both parts of clause 9(i) must be read together; their conditions are mutually dependant. In other words, until Mr. Lyons was reimbursed his deposits by the builder, their contracts did not become null and void.

The legal argument which remains to be decided by this Tribunal is as follows:

Is the fact that Mr. Lyons might ultimately become the owner of the homes sufficient to make the contracts between himself and the builder come within the ambit of the Ontario New Home Warranties Plan Act and therefore to entitle him to his deposits? or

Were the transactions entered into by Mr. Lyons outside the ambit of the Ontario New Home Warranties Plan Act because their purpose was not really for the provision of a home but rather as an investment in a project?

The Tribunal does not believe that the transactions between Mr. Lyons and the builder constituted a contract with a vendor for the provision of a home as contemplated by Section 14(1) of the Act. The transactions fell outside of the ambit of the Act because their primary, if not sole intent, was to provide financing to the builder so that he could proceed with his project, as well as to pay Mr. Lyons's very good friend the \$200,000 owing by the builder on the purchase of the land on which the entire project was to be built. The means by which this could be accomplished was by signing two contracts of sale, thereby allowing for the financing of the project. The fact that Mr. Lyons might ultimately have to acquire and become owner of the homes was a very secondary concern to the whole transaction. Of all the objectives in the transactions, Mr. Lyons becoming the owner was the least sought. Such a possible outcome was accepted only because without it, the project financing and the repayment of his friend for the land could not take place.

Clearly the legislators did not intend this kind of a transaction to be covered by the Ontario New Home Warranties Plan Act. The Act was enacted to protect consumers in good faith who contract for the provision of a home. In reading the Act it is clear that its provisions are predicated upon the buying of the home being the primary object of the contract.

The following are some of the facts which demonstrate that the true intention of Mr. Lyons was never to become the owner of either home:

1. It was Mr. Graham who introduced Mr. Lyons to the builder and was present at the negotiation of the contract. The express purpose was for Mr. Graham to receive the \$200,000 which the builder owed him for the land purchased. He had no chance of receiving payment without Mr. Lyons' active help. It was clear from Mr. Lyons' testimony that he considered Mr. Graham to be a very good friend.

2. It was Mr. Graham who put up the deposit of \$20,000 and not Mr. Lyons. This clearly demonstrates to what degree all the parties wanted the project to go forward. Graham obviously did not put up the deposits for Mr. Lyons to allow Mr. Lyons to become owner of the homes, but rather to make sure that the project could go forward. Without such deposits, no lender would have given the builder the green light.

From Mr. Lyons' point of view, he probably found the transactions that he was to enter into painless since he did not have to put up any of the money himself. None of the parties envisaged at that time that the builder would prove to be unscrupulous and unable to complete the project.

3. Clause 9(i) demonstrates clearly the real intention of the parties. It allows the builder to sell both units of Mr. Lyons for the same price as Mr. Lyons was going to pay. In such case, Mr. Lyons would only be entitled to the refund of his deposits. If the intention of the parties had truly been for the sale of the homes to Mr. Lyons, what purpose could such a right serve? Why would any purchaser who has a buyer at \$125,000 want to find another buyer for the same price? It would be a total waste of his time. As for the purchaser, if he had agreed to buy the units for a price he found acceptable, why would he be prepared to allow the builder to sell them to another party for the exact same price? There would be absolutely no profit to him on such a transaction.

This clause, however, makes a great deal of sense if one presumes that the builder never intended Mr. Lyons to become the owner of the units and Mr. Lyons never intended to become the owner either. In this case, Mr. Lyons would be very keen on the

builder's finding new purchasers. And the builder would want to find other purchasers since he was well aware that the purpose of the transactions between him and Mr. Lyons was solely to finance his project and not for Mr. Lyons to become owner of the units. Both parties signed the transactions in the firm hope and expectation that Mr. Lyons would never become the owner; such an eventuality would occur only as a last resort. Since the builder was to seek new purchasers immediately, the necessity of Mr. Lyons ultimately having to become owner was the most remote eventuality in both their minds.

4. No commissions were paid to the real estate agent who assisted at the transactions. This was in total contrast to other sales made with bona fide purchasers where the agency was paid a commission of 6%. The agent was obviously a party to the financial transactions seeking to green light the project. He knew that Mr. Lyons would be very unlikely to become purchaser of the two homes. He, therefore, also knew that his commissions would be earned on the second sale to third party bona fide purchasers. The agent agreed, therefore, to no commissions in order that the project could go forward since this would be the only way in which he could ultimately earn commissions on sales of homes.

5. That Mr. Lyons believed that he would never have to become owner of the homes is made clear by his failure to choose any of the colours, or fittings or such other items which a purchaser normally does as construction proceeds. This is further demonstrated by his failure to visit the project even once while it was being constructed. He showed no interest because he believed he would never become the owner of the homes.

6. Mr. Lyons testified that he never intended to occupy either of the homes since he already had one.

7. Mr. Lyons made it plain that his real motivation and intention was to help his friend and to give the builder what he required to have the project begin.

The Tribunal believes that the transactions entered into by Mr. Lyons were not for the provision of a home as contemplated by the New Home Warranties Plan Act; rather, Mr. Lyons was really more a member of the construction/vendor group, helping the construction financing by entering into the two transaction with the help of his friend, another member of the group, who put up the deposit. It is unseemly that the Program should be at risk for the \$20,000. The said amount, while described as a deposit, was really an investment in the venture which Lyons believed the builder would complete. Investments are not meant to be guaranteed by the Program. Mr. Lyons and Mr. Graham are the proper individuals to take the risk on the builder's accomplishing his mandate. The

purpose of the New Home Warranties Plan Act is to protect buyers entering into a bona fide purchase contract for the provision of a home and not to protect people making a financial accommodation for a friend or builder. The fact that he might ultimately have to purchase the homes did not bring the transaction within the ambit of the New Home Warranties Plan Act. That eventuality was too remote and too secondary to be considered to be a contract for the provision of a home as contemplated by Section 14(1) of the Act.

Other cases have held that even though a person may ultimately become owner of a unit, that is not sufficient to make them come within the purview of the Act. In determining the applicability of Section 14(1)(a), the case of McGivern (CRAT), released January 25, 1993, the Tribunal stated at pages 5 and 6 of the decision:

Clearly the intended purpose of the Ontario New Home Warranties Plan Act is consumer protection, specifically protection of purchasers and owners of new homes. Accordingly the provisions of the Act should be interpreted in a manner consistent with this objective. However, while the Act should be liberally and largely interpreted with a view to insuring the attainment of its objectives, it is not in our view appropriate to interpret the Act so liberally as to extend its application beyond the ambit of what the language clearly covers. This is particularly true where, as is the case here, the statute is creating a new right or remedy that did not exist before, i.e. a right to compensation from the Program's guarantee fund. Despite the Act's intended purpose of consumer protection, the right to recourse against the guarantee fund cannot be extended beyond the entitlement specifically given by the Act, and cannot be extended beyond those parameters in order to advance the objective of consumer protection.

As well, the Act must be read as a whole and interpreted in the context of its overall framework. The Act requires vendors and builders to be registered with the Program before they can act as vendors or builders. The protection afforded by the Act to consumers, including recourse

to the guarantee fee under section 14 of the Act, is clearly intended to apply to dealings between consumers and persons who are required to be registered with the Program, namely vendors and builders as those terms are defined in the Act. It was not, in our view, intended that consumers dealing with persons who do not fall within the definitions of "vendors" and "builders" and who, therefore, are not required by the statute to be registered under the Program, would nonetheless be entitled to claim against the guarantee fund.

In the case before the Tribunal, the applicant must be able to demonstrate that she clearly falls within the language of section 14(1)(a) and within the definitions that that provision derivatively depends upon. This requires, inter alia, that the contract pursuant to which the claim is made be "a contract with a vendor for the provision of a home".

.....

In Platinum, the Ontario Court of Appeal considered whether the Ontario New Home Warranties Plan Act applied to certain agreements for the purchase of limited partnership interests in a condominium development where the agreements included an option in favour of the investor to obtain a transfer of title to a specific condominium unit once the project had been registered. The question before the Court of Appeal was whether the developer was a "vendor" within the meaning of the Act, and, therefore, required to register with the Program, and inter alia, post deposit protection security with the Program. Consideration of the meaning of the term "vendor" in turn entailed consideration of the definition of "sell" in s.1(1) of the Act and specifically the meaning of "an agreement to sell". The Court of Appeal cited a passage from the decision of the United States Supreme Court in Treat v. White, 181 U.S. 264 (1900), that "an

agreement to sell is simply an obligation on the part of the vendor to complete his promise of sale."

Although the agreement before the Court of Appeal clearly imposed a positive obligation upon the vendor to transfer title to the unit to the investor, at the investor's opinion, the Court of Appeal found that this factor alone was not determinative of whether or not the agreement to sell the unit within the meaning of the Act.

At page 519 of Platinum, Mr. Justice Carthy, who wrote the reasons for decision states: "It is tempting to reach out to the high authority of Treat v. White and conclude that no matter how you describe the agreement before us it is an agreement to sell. However, in the same opinion Mr. Justice Brewer recognized that even the letter of a statute may not control if there is reason to suggest that the legislature intended otherwise." The Court of Appeal went on to consider the essential nature of the transaction and to characterize its prime thrust as a tax driven scheme allowing a purchaser to join with others in the business of renting housing units. The option to take title to a condominium was characterized as an "appendage" to this central purpose and not determinative of the transaction's essential nature. The Court reasoned that the Act was intended to provide protection to purchasers of new homes and noted the lack of harmony between this protection and the nature of the transactions before it. In result, the Ontario Court of Appeal concluded that the agreements were not agreements to sell a home within the meaning of the Act. In effect, the Court of Appeal reined in and restricted the letter of the statute by interpreting it in a manner which was consistent with its objective of protecting new home purchasers and owners.

The Applicant, therefore, is not entitled to the refund of his deposit.

Accordingly by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow this claim.

RUSSELL MACKIMMIE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding
ANNE SONE, Vice-Chair as Member

APPEARANCES:

DAVID M. WOODWARD, representing the Applicant

BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 14 January 1994

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program (the "Program"), rendered, May 31, 1993, disallowing a claim by Mr. Russell MacKimmie. Pursuant to section 14(1)(a) of the Ontario New Home Warranties Plan Act, Mr. MacKimmie is seeking the return of his deposit from Relax Development Corporation Limited (the "Developer"), in connection with an Agreement of Purchase and Sale (the "Agreement"), on a property municipally known as Unit 2, Level 3, 875 Wellington Road, London, Ontario (the "Unit").

The facts in this case are not in dispute. Mr. MacKimmie testified that he had paid a total deposit of \$29,500 under the Agreement on a specific unit sold as a condominium in a hotel. Section 19 of the Agreement provided him with the right to terminate the Agreement if the condominium's Declaration and Description were not registered within 36 months of the date of closing. Mr. MacKimmie exercised his right to terminate the Agreement in a letter dated October 16, 1992. Under section 19 of the Agreement, Mr. MacKimmie had the right to the return of his deposit. Mr. MacKimmie has not received his deposit from the Developer, although demand has been made.

Mr. MacKimmie's request for the return of his deposit, which is subject to the limit of \$20,000 set out under Section 6 of Regulation 892, was denied by the Program. In its decision, the Program asserts that the real estate in question does not qualify as a "home" under the terms of the Ontario New Home Warranties Plan Act. In addition, its records indicate that

there was no attempt to "enrol" this project at the time of construction, which according to the Program would not have been allowed, if such attempt had been made.

By way of explanation, the Program indicated that there had been two relatively recent decisions of the Ontario Court of Appeal that have concluded that certain "investor" projects are not properly covered by and do not come within the provisions of the Ontario New Home Warranties Plan Act. These cases are: Ontario New Home Warranty Program v. Marchant Building Corp. (1991), 1 O.R. (3d) 513 (C.A.) and The Brownstones East Limited Partnership v. Ontario New Home Warranty Program (1992), 8 O.R. (3d) 545 (C.A.).

The Tribunal thanks counsel for both parties for their able arguments. Counsel for the Applicant commenced by referring to the applicable sections of the Ontario New Home Warranties Plan Act and the Condominium Act. He started with the Ontario New Homes Warranties Plan Act, which defines "home" as follows:

1. In this Act,
 "home" means,
 (c) a condominium dwelling unit,
 including the common elements,
 and includes any structure or
 appurtenance used in conjunction
 therewith, but does not include a
 dwelling unit built and sold for
 occupancy for temporary periods or for
 seasonal purposes;

Counsel stated that the Applicant was not relying on the definition of "home" under the Ontario New Home Warranties Plan Act for the return of \$20,000.00 plus accrued interest. Instead, counsel for the Applicant relies on section 37 of Regulation 96 under the Condominium Act (Ontario) as follows:

37.-(1) In this section,
 "purchaser" means a purchaser, the
 purchaser's successors and assigns under an
 agreement of purchase and sale of a proposed
 condominium unit who has paid money, to which
 Section 53 of the Act applies, to a
 declarant;

"warranty corporation" means the corporation
 designated under section 2 of the Ontario New
 Home Warranties Plan Act.

(8) The warranty corporation shall, immediately upon receipt of written notice of a claim by a purchaser under a deposit receipt, provide the purchaser with forms upon which to make proof of loss.

(9) Where the warranty corporation receives written notice of a claim under subsection 8, it shall pay the purchaser within sixty days after the right of the purchaser to payment under the deposit receipt has been established.

(10) The warranty corporation shall remain liable under a deposit receipt until,

(a) a deed or transfer of the unit acceptable for registration is delivered to the purchaser;

(b) the declarant pays to the purchaser all money to which section 53 of the Act applies; or

(c) the warranty corporation pays to the purchaser the amount of any loss to the extent of the corporation's liability.

(11) Where the warranty corporation is required to make a payment under a deposit receipt, interest at the rate prescribed by section 35 shall be paid to the purchaser to the date of payment of the loss.

Counsel for the Applicant also referred to the following sections of the Condominium Act.

1.-(1) In this Act,

(s) "property" means the land and interest appurtenant to the land described in the description, and includes any land and interests appurtenant to land that are added to the common elements;

(t) "proposed unit" means land described in an agreement of purchase and sale that provides for delivery to the purchaser of a deed or transfer capable of registration after a declaration and description have been registered in respect of the land;

Essentially, counsel for the Applicant argued that the Ontario New Home Warranties Plan Act did not have to apply because the Condominium Act applies.

He expanded his argument, stating that the definition of "home" in the Ontario New Home Warranties Plan Act may exclude the type of property upon which Mr. MacKimmie is claiming a refund of his deposit.

Further, he stated that the two Ontario Court of Appeal decisions, referred to by the Program, may decide that this type of investment is not meant to come within the scheme of the Ontario New Home Warranties Plan Act.

However, in counsel's review of this Act and its Regulations, he stated that he did not find any provision that addressed the issue of whether a deposit for a condominium is covered under the Act. Accordingly, he argued that the above-mentioned sections of the Condominium Act and its Regulations applied to make the Program liable to Mr. MacKimmie.

Alternatively, counsel for the Applicant argued that even if the Program can rely on the Ontario New Homes Warranties Plan Act, Mr. MacKimmie's condominium was not constructed for temporary periods or for seasonal purposes. According to counsel, this condominium unit was designed to be occupied year round and as often as possible. Thus, the Unit does not constitute seasonal or temporary accommodation within the meaning of Section 1 of the Ontario New Home Warranties Plan Act, and is not excluded from coverage.

In addition, counsel for the Applicant sought to distinguish the two Ontario Court of Appeal decisions referred to by the Program on the basis that they dealt with purchases of limited partnership units and not purchases of condominium units under an agreement of purchase and sale.

In response, counsel for the Program asserted that there could be no coverage for Mr. MacKimmie if the Ontario New Home Warranties Act Plan Act did not apply.

It was established during cross-examination that Mr. MacKimmie was not entitled to occupancy or possession of the condominium unit, according to the terms of the Agreement. Mr. MacKimmie admitted that he did not sell the house he was occupying in anticipation of moving into the condominium. Counsel for the Program referred to the following provisions of Schedule "A" to the Agreement:

15. ...It is agreed and understood between the parties hereto that although the term "Occupancy Date", and "Occupancy", and "Interim Occupancy Period" may be used throughout this or any attached Schedules or Agreements, the Purchaser shall not be entitled to occupancy or possession of the Unit in question, but shall deposit such occupancy right upon it becoming available to him to Relax Hotels & Resorts Ltd., pursuant to an Agreement to be executed between such Company and the Purchaser at the time that occupancy is available.

33. The Purchaser hereby acknowledges that it is the intention of the Vendor to the extent permitted by law, to sell each unit in the Condominium only to a Purchaser who covenants that he will enter into a long term agreement with Relax Hotels & Resorts Ltd., a body corporate incorporated under the laws of Canada, and having offices in the City of Calgary, in the Province of Alberta, whereby he, in conjunction with the owners of all other units in the Condominium, will retain the services of such Company in managing each unit as an integral part of a hotel complex whereby the revenues generated by the operation of such hotel and the rental of rooms therein will be pooled with the expenses to be paid therefrom including a management fee to such Company,....

...it being the intent of the Purchaser and all other unit owners to not reside in any portion of the Condominium, or to permit same to be used for residential purposes, but to treat same as a property investment for the purpose of generating income, and for that purpose to operate same as a hotel business.

The Purchaser further acknowledges and agrees that all of the foregoing covenants shall survive the closing of this transaction,....

In addition, the following portions of Schedule "B" and "D" to the Agreement were noted:

Schedule "B"

The Unit in question will be finished and furnished as according to model hotel suite constructed by Vendor, in order to provide accommodation to hotel guests...

Schedule "D"

4. Pending registration of the Declaration, Description and By-laws of the Corporation as aforesaid, and so long as the Purchaser is not in default hereunder, the Purchaser shall not occupy the Unit for his own personal gain or benefit, but shall occupy same as a Licensee for purposes of operating a hotel through Relax Hotels & Resorts Ltd., ...

5. ...the Purchaser covenants that the Unit shall be used only as a hotel suite as contemplated by a proposed agreement between the Purchaser and Relax Hotels & Resorts Ltd.,

Mr. MacKimmie admitted on cross-examination that he was entitled to write off certain costs of the condominium against earned income, but was unable to quantify this amount.

Counsel for the Program argued that what Mr. MacKimmie purchased was not a home according to the definition set out above under the Ontario New Home Warranties Plan Act, which excludes "a dwelling built and sold for occupancy for temporary periods or for seasonal purposes". According to counsel, Mr. MacKimmie was not entitled to occupancy or possession of the Unit under the Agreement and he had no intention to reside there. What Mr. MacKimmie purchased was a condominium to be rented as a hotel suite to hotel guests for temporary periods. Furthermore the development was zoned commercial rather than residential. Accordingly, the unit was not within the definition of home, and therefore, according to counsel, Mr. MacKimmie cannot make a valid claim under the Ontario New Home Warranties Plan Act.

Counsel for the Program also stated that Mr. MacKimmie could not be an "owner" under the Ontario New Home Warranties Plan Act because "owner" is defined as "a person who first acquires a home from its vendor for occupancy, and the person's

successors in title". Because Mr. MacKimmie did not intend to occupy the Unit, which is not a "home" under the Act, it follows that Mr. MacKimmie is not an "owner", according to counsel. The same argument was made respecting the Developer who cannot be seen as a "vendor" under the Ontario New Home Warranties Plan Act, which is defined to mean "a person who sells on his, her or its own behalf a home not previously occupied". Because Mr. MacKimmie's condominium unit was not a "home" under the Act, the Developer could not be a "vendor" under the Act. Finally, counsel also pointed out that in order for the money paid by Mr. MacKimmie to be characterized as a "deposit" under section 1 of Regulation 892 to the Act, it had to be "in respect of a home" which definition is at issue here.

Alternatively, counsel for the Program argued that if Mr. MacKimmie is entitled to a refund of his deposit, then the Program would then be entitled to set off any tax or other benefit Mr. MacKimmie has received as a result of his purchase of the condominium unit.

With respect to the Condominium Act, counsel for the Program indicated that the provisions of this Act do not come into play until "after the right of the purchaser to payment under the deposit receipt has been established", which is the subject matter of this hearing.

In the view of this Tribunal, the Applicant must bring himself with the confines of the Ontario New Home Warranties Plan Act to be entitled to compensation under that Act. The Condominium Act does not determine eligibility for compensation under the Ontario New Home Warranties Plan Act.

We agree with counsel for the Program that the Unit here is not a "home" within the meaning of the Ontario New Home Warranties Plan Act. This Act contemplates owner occupancy. The evidence is clear that the Applicant did not intend to occupy this Unit.

On the contrary, the Applicant intended the Unit to be rented as a hotel suite to hotel guests. No evidence was presented to this Tribunal that this hotel suite would provide any accommodation other than for "temporary periods or for seasonal purposes".

The Tribunal concurs with the view of counsel for the Program that Mr. MacKimmie's claim does not fall within the Ontario New Homes Warranties Plan Act. Because the Tribunal finds that Mr. MacKimmie's claim is not covered under the Ontario New Home Warranties Plan Act for the reasons set out above, it is not necessary to rely on the recent judgements of the Ontario

Court of Appeal respecting the disentitlement to coverage of investor projects under the Ontario New Home Warranties Plan Act.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal upholds the decision of the Ontario New Home Warranty Program to disallow the claim of the Applicant.

MR. AND MRS. SERAFINO MARANO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding
JUDITH ANN KILLORAN, Chair as Member
EDWARD WEISZ, Member

APPEARANCES:

JOSEPH R. HENDERSON, representing the Applicants

NETANUS T. RUTHERFORD, representing the
Ontario New Home Warranty Program

JOSEPH WALKER, representing Old Niagara Homes Inc.,
a party

DATES OF HEARING: 7 October 1993 and
26 January 1994

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal by the Applicants from a decision of the Ontario New Home Warranty Program set out in a decision letter dated March 1, 1993. At the opening of the hearing, counsel for the Applicants stated that their claims were based upon the provisions of both subsections (a) and (b) of Section 14(1) of the Ontario New Home Warranties Plan Act which reads:

14.(1) Where,

- (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

- (b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty;

.....

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

The relevant facts are as follows.

In 1973, the Applicants bought the land in question here being part of lot 10 in the third concession of the Township of Welland. On or about the 3rd day of August 1990, they entered into a contract in writing with Old Niagara Log Homes Inc. to build a log house for them on this property. There is an obvious discrepancy in this document with regard to the amount to be paid. In the opening paragraph of the operative part of the agreement, there is stated to be a deposit of \$1,000.00. In paragraph 2, the purchase price and terms of payment are set out:

2. The Purchasers agree to pay to the Builder the sum of \$148,600.00 for the said residence at the times and in the manner hereinafter set forth:
- (a) \$25,000.00 ✓ upon the signing of the contract;
 - (b) \$25,000.00 ✓ completion of foundation walls and backfill;
 - (c) \$25,000.00 ✓ Log Home Material Delivery (See building materials package Contract)
 - (d) \$ Roof on Stage
 - (e) \$35,000.00 ✓ when aluminum siding is installed, if timber construction completion of soffit and fascia; Soffit and fascia in Timber construction is completed at Roof on stage.
 - (f) \$31,960.00 upon substantial completion or upon moving in (whichever occurs first) (subject to adjustments);
 - (g) \$8,640.00 forty-five (45) days following item (e).

Plus any extras as agreed upon by the parties hereto in writing.

All payments are due and payable within five (5) days of the completion of that stage of construction for which the payment is due. Thereafter, any unpaid payments shall accrue interest at the rate of 2 per cent per month. The payment due on substantial completion or upon moving in must be made before the Purchasers take possession.

The total of the sums shown payable in this paragraph is \$150,600 and not \$146,600 as stated at the beginning and there is no reference to or accounting for any \$1,000 deposit.

Paragraph 8 of the Agreement provided that the builder was to commence work on September 1, 1990 and finish by January 20, 1990 (this last presumably being another error and should have been January 20, 1991). By January 20, 1991, the house was not nearly completed and serious difficulties had developed between the parties. There had been some difficulties over the payments. The \$35,000 payment stipulated in clause (e) of paragraph 2 of the Agreement was not made on time, but it was in fact made and accepted and some other money had been demanded by the builder and paid before it was due so that in the result, when the carrying out of the contract broke down in January of 1991, it was established and conceded by the Program and the Builder that \$111,000 (the deposit and the first four scheduled payments) had been made. Accordingly at that time, the Applicants were not in default under the contract.

There had also been some difficulties as a result of extra fill having to be brought in for the weeping bed and there was an issue at the hearing as to whether Mr. Walker, when he met on site with Mrs. Marano and Joe Marano, the Applicants' son, had tried to get an agreement through Joe Marano with regard to some extras under the contract, without Mrs. Marano knowing what was going on. However, as we see the issues to be determined in this case, we do not have to decide who has the right of this dispute. There were also difficulties created by reason of alleged changes made in the building plans by the Applicants which they requested, but refused to confirm in writing. The contract provided that no changes were to be effective unless they were in writing. Again there is no issue here which we must decide. The builder's rights and obligations were clear under the original contract. If the Applicants refused to give their proper written authorization, the builder could not charge for any extras but, on the other hand, he had no obligation to provide them and should not have done so. There is no doubt that the son, Joe Marano, did deal with Mr. Walker in respect of a number of matters concerning the contract. Mr. Walker claimed that the circumstances were such that he was entitled to deal with Joe Marano as an agent of the Applicants. The Applicants strongly denied this and said there was no such authorization on their part. However, again it is not essential for us to determine this issue.

The relevant and admitted facts are that the builder ceased work on the house in January 1991 when it was far from

complete at a time when he had been paid \$111,000 as aforementioned and at a time when there were unpaid subcontractors who were threatening to place construction liens against the title in the Registry Office. At least one of these subcontractors came to the Maranos for payment and asked Mrs. Marano to sign some document which she refused to do. However, it was her evidence that she did pay this subcontractor almost \$7,000 to avoid the filing of a lien. At this time, Mr. Walker was refusing to do any more work on the house until his claims with regard to extras were resolved. The evidence establishes that he left the project and indeed went off to Florida on a vacation.

By January 31, 1991, the Applicants had retained a solicitor, Mr. A.T. Lacavera of Welland and the latter wrote to Mr. Walker on that date as follows:

We act for Mr. and Mrs. Morano.

The contract calls for completion before January 20, 1991 (typographical error January 20, 1990).

We understand that you are off to Florida on a vacation and that you have told Mr. and Mrs. Morano that you are not prepared to complete this contract without further payments.

Mr. and Mrs. Morano have performed their terms of the contract and have paid \$110,000.00. The next payment is due on substantial completion and, in our opinion, you are not entitled to call for any further payments until that time.

Unless you recommence construction immediately, we will have no alternative but to hire someone else to complete construction, and should it cost more than your contract provides, we will look to you for the difference plus interest and legal costs.

I understand that Mr. and Mrs. Morano's son gave you until the 20th of February, 1991 to complete this contract. The contract is not with their son and he has no authority to alter this contract in any way.

(Exhibit 14, tab 4)

It is to be noted that in the fourth paragraph of this letter, there is a reference to \$110,000 paid while the other evidence noted above refers to \$111,000. It would appear that the proper figure is probably \$110,000, but in the result, nothing turns upon this.

On the same date, Mr. Lacavera wrote to the Program, enclosing copies of the original contract and of his letter to Mr. Walker and putting the Program on notice of the claim which the Applicants might have against it.

Later Mr. Walker returned from Florida and carried on some negotiations with Mr. Lacavera, some of which were in writing and some on the telephone which resulted in his, Mr. Walker's, making an offer in a letter written on March 20, 1991 by way of proposed amendments to the original contract providing for a revised contract price, certain payments for extras, an acknowledgment of the monies paid to date, an agreement that there would be a final balance owing of \$41,693.00 and a provision that this sum be paid immediately by the Applicants in trust to their solicitors upon terms that the builder was to finish the house by May 30, 1991 or sooner if possible and, if no liens were registered within the 45 day holdback period, this money was to be released to the builder. There were other specific terms in the letter as to work remaining to be done and certain responsibilities of the owners.

Mr. Lacavera replied to this letter by way of another letter dated March 28, 1991 to Mr. Walker in which he stated that his clients were prepared to accept the offer of the builder subject to ten numbered points which he indicated he had already discussed on the telephone with Mr. Walker.

A substantial issue arose between the parties at the hearing as to whether a new contract came into being between the Applicants and the builder at that time based upon the terms and conditions set out in these two letters. If what we have outlined to this point were all of the evidence on this issue, we should have no difficulty in finding that there was, in fact, no second contract. These letters constituted an offer by Mr. Walker on the part of the builder to make a new contract and a counter offer by the Applicants' solicitor to do so. At this point, there was no acceptance by either parties of the offer of the other.

However, Mr. Walker then proceeded upon what he said was his understanding that a second contract had been made. He went to see Mrs. Marano and got instructions as to certain details for finishing the house, arranged with her to remove some "No Trespassing" signs she had put on the property to keep him and his workers and tradesmen out (which signs she did in fact remove) and he caused his company and certain subcontractors to recommence work. He said that he did so proceed from March 28 to April 9. He also said that he had made it clear in conversations with both Mrs. Marano and Mr. Lacavera that his #1 concern was that the

\$41,693.00 be put into trust so that his company would get paid when the project was completed. He said that when he saw Mrs. Marano and proceeded with the details to carry out his part of the new agreement, she gave no indication that she did not consider there was such an agreement.

On April 9, Mr. Walker had occasion to call Mr. Lacavera to sort out a problem which had arisen about one of the extras and, by coincidence, the latter was talking on the telephone with Mrs. Marano at the time and Mr. Lacavera got all three of them on a conference call to deal with the problem. During the course of this three-way conversation, it came to light that the Applicants had not placed the \$41,693.00 in trust with Mr. Lacavera and further that Mrs. Marano had no intention of doing so, and further that the Applicants would not pay until required to do so under the original contract. At this point, Mr. Walker said "Enough is enough" and immediately ceased all work on the project and consulted his solicitor. He admitted that, when he left the project for good on April 9, the house was not yet in a state of "substantial completion" to create the obligation for the \$31,960.00 payment required in clause (f) of paragraph 2 of the original contract. In his evidence, Mr. Walker put it very strongly that there was a second contract and that the conduct of the Applicants was such that he was completely justified in this belief and it was clearly the Applicants who were in breach of its terms and not he.

However, the matter did not stop there. At this time, the Applicants changed solicitors from Mr. Lacavera to the firm of Mr. Henderson who appeared for them here and this firm carried on negotiations both in writing and on the telephone with the builder's solicitors which resulted in a letter dated June 11, 1991 (Exhibit 36) in which the Applicants' solicitors advised the builder's solicitors:

Please be advised that \$41,693.00 is held in trust in an interest bearing account with Central Guaranty Trust. The funds will be released pursuant to the terms of the letter from Blackadder, Lacavera dated March 18, 1991.

We look forward to complete of this house by no later than July 28, 1991.

Because the sun may dry out the pine exterior, it should be appropriately treated and stained in the near future.

Mr. Walker said that when his solicitor told him of this letter, he told her "I have no desire to go back - I had tried to work it out earlier and was fed up with it now - I had two other jobs going then." In the result, Mr. Walker did nothing in response to this advice that the Applicants had now complied with this request which he had stated to be his number one concern.

There is one other piece of evidence to which we should refer related to this question as to whether there was a second contract. Counsel for the Applicants tendered as evidence an affidavit sworn on January 14, 1994, by the solicitor Mr. Lacavera to which counsel for the Program objected as being inadmissible without her having the right to cross-examine the deponent. After hearing argument on this issue from both counsel and considering the matter, the Tribunal decided that it should permit the filing of this document as an exhibit and consider its contents but attach less weight to this evidence, particularly where it might be at variance with oral evidence given before us. A perusal of the affidavit shows that Mr. Lacavera deals only with the negotiations and exchange of correspondence between himself and Mr. Walker leading up to Mr. Walker's offer in the letter of March 20 and his counter offer in his letter of March 28, and the fact that there was no response to the latter and, therefore, no contract based upon any of this. This is precisely the same conclusion which we indicated above we would have reached upon the same evidence. Mr. Lacavera does not go on in the affidavit to deal with any of the subsequent happenings upon which Mr. Walker bases his case.

Except for evidence directed toward the proper measure of damages, in the event that the Applicants are entitled to succeed, with which we shall deal later, the foregoing are the essential facts to be taken into account.

The first issue with which we shall deal is that of the alleged second contract. It is the Tribunal's view that it really does not have to determine this issue for two reasons. Even if we were to find there was such a second contract as alleged on behalf of both the Program and the builder, it is clear that it contained no term or terms which abrogated the provisions in the first contract upon which the Applicants rely in making their claim herein. Secondly if there were such second contract, we would find that, in the end, it was the builder and not the Applicants who breached it. Time was not of the essence for each thing to be done and, if the critical term was, as Mr. Walker said, the placing of the money in trust, this was done within a time when the builder should have completed its obligations and finished the house.

There were difficulties caused by both parties, but in

the end the Applicants fulfilled all of their obligations to the builder and it was Old Niagara Log Homes Inc. which breached the contract by failing to complete the building of the home. This brings the Applicants' claim within the provisions of Section 14(1)(a) of the Act quoted above. The Applicants were persons who entered into a contract with a vendor (see definition in section 1 of the Act "vendor...includes a builder who constructs a home under a contract with the owner" for the provision of a home and who have a cause of action in damages resulting from the vendor's failure to perform the contract.

It remains for the Tribunal to determine what is the proper amount to be paid out of the guarantee fund to the Applicants. This is defined in the last part of subsection (1) of Section 14 as being "the amount of such damage subject to such limits as are fixed by the Regulations." In this case, it is useful to look first at the limit fixed by the Regulations. This is found in Section 6(1) of Ontario Regulation 892 which reads:

Section 6-(1) A purchaser who has a claim under clause 14(1)(a) of the Act in respect of a purchase agreement entered into after the 30th day of June, 1988 is entitled to be paid out of the guarantee fund an amount for damages arising from the breach of the agreement by the vendor that does not exceed \$20,000.

Therefore, this is the maximum which the Applicants can recover.

In finding what damages resulted to the Applicants herein, the Tribunal is of the view that the proper method of determining the same is the ordinary rule for determining damages for breach of contract, namely the difference between the value of what the Applicants were given and what they bargained to get and were entitled to get. On this point, there was a conflict between the evidence of Mr. Bruin given on behalf of the Applicants and that of Mr. Walker on behalf of the builder upon which the Program also relied. Mr. Bruin was found by the Tribunal to be qualified as an expert to give such evidence and he found that the additional cost of giving the Applicants a house to which they were entitled was \$70,000. It was Mr. Walker's evidence that the value of the work received by the Applicants from him exceeded the amount of \$111,000 which they had paid and, therefore, they had no damages at all.

The Tribunal prefers the evidence of Mr. Bruin for two reasons. In the first place we think that Mr. Bruin addressed the right question while Mr. Walker did not. Even if the builder had entered into a contract which was substantially too low, it would still have been obligated to carry it out and be liable in damages to put the Applicants in the position which they should have been if it did not do so. In the second place, there is no doubt that there were substantial costs incurred by the owners as a result of the builder's failure to complete the house. These facts were taken into account by Mr. Bruin and not by Mr. Walker. However, we should add that if it were not for the limit of \$20,000 aforementioned, we should have had difficulty in going so far as \$70,000 on this evidence.

A few other pieces of the evidence should be mentioned on this issue of the amount of the damages. Mr. Bruin made his appraisal while a furnace and a garage door installed by the builder were still in place on the premises. It was established that, after that time, these items were removed from the property. The applicants alleged that the builder removed them to use them somewhere else, but the builder denied this. In view of the limitation on the applicant's recovery to which we shall refer, it is not necessary for us to resolve this issue but we would comment that we would have had difficulty finding upon the evidence we have that the builder did take them away.

Another point to be made is that there was over \$41,000 by way of holdback and Mr. Walker was not prepared to complete the building at first until this was put into trust and later on even after it was there. On all of this evidence, the Tribunal finds that the Applicants' damages were at least the sum of \$41,693 and since the maximum recovery is \$20,000, we need not pursue this issue further.

We should comment on the claim pursuant to clause (b) of Section 14(1) of the Act. We would not have found the Program responsible under this provision. We are of the view that a breach of warranty to which reference is made therein is a breach of the warranty provided by Section 13(1) of the Act and not of any other warranty whether at common law or pursuant to some other Statute such as the Sale of Goods Act. This being so, this warranty never came into effect as there was no compliance with subsection (3) of Section 13:

- (3) The vendor of a home shall deliver to the owner a certificate specifying the date upon which the home is complete for the owner's possession and the warranties take

effect from the date specified in the certificate.

A Warranty which never came into effect cannot be breached.

We should also comment upon an argument put forward by counsel for the Program that the Applicants' recovery should be subject to the provisions of subsection (7) of Section 6 of Regulation 892 aforementioned:

- (7) Liability in respect of the cost of completion of a home is limited to 2 per cent of the sale price of the home or \$5,000, whichever is the greater.

If applicable, this would restrict the Applicant's recovery to \$5,000. The Tribunal does not find this provision applicable to this claim. In the first place, the recovery of the Applicants is not the recovery of a cost to complete, but rather damages for breach of contract as set out above. In the second place, subsection (7) must be read in conjunction with the whole of the section and clearly the limitation intended to apply to the circumstances of this claim is that contained in subsection (1).

Accordingly the Tribunal, pursuant to the authority vested in it by section 16(3) of the Ontario New Home Warranties Plan Act, directs the Ontario New Home Warranty Program to allow the claim of the Applicants and pay to them the sum of \$20,000.

MASKALUK, GARY AND ALESSANDRA

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding

APPEARANCES:

MICHAEL S. STRATTON, counsel,
representing the Applicants

RICHARD CARTY, counsel, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 7, 20 September 1993

Toronto

REASONS FOR DECISION AND ORDER

Mr. and Mrs. Maskaluk appeal a decision by the Ontario New Home Warranty Program to deny them compensation for an alleged financial loss of \$18,556.92 resulting from their builder's failure to perform the construction contract. They also appeal the Program's decision to deny them compensation for a breach of warranty for squeaky floors in their home.

By letter dated April 21, 1993, the Program denied that the Applicants had suffered any financial loss because of the builder's breach of contract. On the contrary, the Program took the position that the Maskaluks had benefitted in the amount of \$26,906.96. By calculating damages as at the date of the contract breach, the Applicants, in the Program's view, paid \$79,347.14 to obtain \$106,254.00 worth of house.

The Program also denied the breach of warranty claim for squeaky floors on the basis that the Applicants' subsequent contractor should have ensured that the subfloor was properly secured. At issue is a claim in the amount of \$1177.00 to remedy the squeaky floors.

The principal issues in dispute are whether the Applicants suffered a financial loss that was occasioned by their vendor's breach of contract and, if so, whether that financial loss is compensable under the Ontario New Home Warranties Plan Act (the "Act"); finally, the issue remains that if the financial loss is compensable, what amount of compensation is payable.

The issue of the breach of warranty can be resolved upon a brief review of the relevant facts and the onus of proof in these proceedings.

The facts are as follows.

By Agreement of Purchase and Sale dated October 31, 1990, the Applicants purchased a lot from #703225 Ontario Inc. for the amount of \$72,000. By a Building Agreement of the same date, 703225 Ontario Inc. and Lepp & Sons Builders (1974) Limited, collectively referred to in the Building Agreement as the "Builder" or Vendor", agreed to build a home upon the lot for the Applicants. The purchase price of the home was \$188,500.00 and closing date was fixed for June 28, 1991.

Mr. Maskaluk testified that construction of the home appeared to be progressing in March 1991. At that time, title was transferred from 703225 Ontario Inc. to the Applicants, upon payment of the amount of \$132,140.00. This amount included the purchase price for the land of \$72,000.00 (minus \$10,000.00 deposit), G.S.T. on the land of \$4340.00, and the first payment under the Building Agreement of \$55,800.00 (being \$62,000.00 less 10% Construction Lien Holdback).

However, by an Undertaking dated March 12, 1991, 703225 Ontario Inc. acknowledged to the Applicants that it alone was responsible for the payment of the "General Sales Tax (G.S.T.)" of the amount of \$4340.00 (being 7% of \$62,000.00, the net purchase price of the lot). As well, 703225 Ontario Inc. agreed to pay G.S.T. of \$3906.00 (being 7% of \$55,800, the first instalment under the Building Agreement). The total G.S.T. payable by 703225 Ontario Inc., pursuant to this Undertaking, was calculated to be \$8246.00.

According to the evidence, neither the Agreement of Purchase and Sale nor the Building Agreement addressed the issue of which party was responsible for the payment of the G.S.T.

Under an additional Undertaking dated March 12, 1991, 703225 Ontario Inc. and Lepp & Sons agreed to register the home with the Program, which was done.

However, by June 1991, construction work at the site had apparently ceased. A title search showed construction liens were being registered against the Maskaluk's home, commencing March 1991. The total amount of liens registered was \$125,319.72.

By letter dated June 4, 1991, counsel for the Applicants gave clear notice to 703225 Ontario Inc. and Lepp & Sons that unless construction recommenced by June 10, 1991, the Applicants

would treat the contract as abandoned. Counsel for the Applicants further advised in the letter that the actual value of the work in place would be estimated, the contract would be completed by others, and any additional costs incurred by reason of the contract breach would be claimed as damages against 703225 Ontario Inc. and Lepp & Sons.

By letter dated June 12, 1991, counsel for the Applicants confirmed this course of action, 703225 Ontario Inc. and Lepp & Sons did not respond and never apparently returned to complete the construction of the Maskaluk home.

By report dated June 11, 1991, Mr. W.R. Ellwood of W.R. Ellwood Building Inspections Inc. estimated the value of the construction work in place to be \$106,254. This valuation was not challenged by the Program. Ellwood Building Inspections took photographs of the site on June 5, 1991. These photographs were entered into evidence.

Both the report and the photographs detail an unfinished house at the drywall/roughed-in mechanical stage. The foundation, framing, roof, shingles, windows, some exterior doors and some drywall had apparently been completed. However, the house lacked exterior finishes, grading and a garage floor and door, and was thus not "water-tight" and secure. The drywall was incomplete, the floors consisted of plywood secured to the joists, and the electrical system was not operational.

Also noted in the report of June 11, 1991, were two framing deficiencies only: i) the wood "I"'s supporting the living and dining room floors were spaced 3" wider apart than indicated in the drawings. It is suggested that the design floor loading be checked; and ii) the wood "I"'s supporting the family room floor were "shimmed" and should be replaced to provide proper bearing. Otherwise, according to Mr. Ellwood, upon inspection there were not obvious or substantial defects in the construction work in place.

Ellwood Building Inspections estimated the cost to complete the house to be \$108,545. By letter dated June 14, 1991, Brieland Homes Inc., of which Mr. W.R. Ellwood is president, agreed to complete the Maskaluk's home "in accordance with [the] Building Agreement". Brieland Homes agreed to proceed on a cost plus fixed-fee basis, with its management fee of \$10,000 included in the estimate of \$108,545, to complete the home. This amount excluded G.S.T. The home was to be ready for occupancy by July 28, 1991.

Mr. Maskaluk testified that he moved with his family into the finished home in mid-August 1991. He stated that he paid in total to Brieland Homes the amount of \$123,426.07 to complete the construction of his home. This amount of \$123,426.07 was accepted

by counsel for the Program to be accurate. Both parties further accepted that this amount of \$123,426.07 includes G.S.T.

Mr. Maskaluk further testified that no changes were made to the original Building Agreement. Mr. Ellwood also testified that his intention was to complete the house specifically according to the original Building Agreement. This was done, he said, to the best of his knowledge. This testimony was not discredited by counsel for the Program.

However, this amount of \$123,426.07 did not represent the total expenditures incurred by the Applicants as a result of the contract breach by 703225 Ontario Inc. and Lepp & Sons. Mr. Maskaluk testified that he paid \$23,210.09 into court in March 1992 to discharge all the construction liens of \$125,319.72 registered against his home.

Mr. Maskaluk also testified that he paid \$161.07 in interest on alternate mortgage financing made necessary because of the construction liens registered against his home. In order to obtain this alternate mortgage financing, Mr. Maskaluk testified that he paid \$226.99 in legal fees. Mr. Maskaluk also claims the following additional expenses: i) \$3068.48 for light fixtures, construction insurance, repair to water service and hydro connection; ii) \$827.17 to complete fireplace; and iii) \$337.05 to correct air conditioning, which, according to Mr. Ellwood was installed by the original Builder.

Mr. Maskaluk testified that the total amount paid by the Applicants to complete the construction of the home was \$207,056.92. Minus the original contract price for the home of \$188,500.00, the Applicants claim \$18,556.92 in total damages for financial loss resulting from the failure of 703225 Ontario Inc. and Lepp & Sons to perform the Building Agreement.

Breach of Warranty Claim

In the summer of 1991, Mr. Maskaluk testified that Brieland Homes completed the flooring by first installing the underlay over the plywood and subsequently installing carpeting and vinyl flooring. By fall 1991, Mr. Maskaluk testified that he noted the excessive squeaking of the floors in the four bedrooms, hallway and bathroom on the second level, and the main-level kitchen

The Program agreed that these floors were excessively squeaky and further, that the Applicants' claim for a breach of warranty was made within the first year of possession and was thus timely.

Mr. Ellwood testified that upon visual inspection of the plywood floors installed by Lepp & Sons, there were no apparent defects in workmanship and materials. He performed no tests upon the flooring. He stated that the plywood flooring would not have been affected by the approximately 2-month delay in finishing the flooring. Mr. Ellwood admitted that he was not sure what caused the excessive floor squeaking.

The Program representative, Mr. Richters, took the position that the normal practice in the construction industry is that the finishing contractor should ensure that the previously completed work has been done correctly before proceeding to the next stage of construction. He admitted that the Program performed no tests to determine the cause of the defect but, in his opinion, excessive squeaking could be caused by drying of materials, using nails instead of screws to secure the plywood to the joists, or defective plywood. He agreed that the latter defect would likely be apparent upon visual inspection. According to Mr. Richters, the cause of the defect may not be apparent until the repairs are begun. Mr. Richard Parker of the Program also testified that it was unclear whether the Lepp & Sons or Brieland Homes was responsible for the floor defect.

The parties did agree how to remedy the defect: lift the rug, screw down the subfloor and re-install the carpet. The Program obtained an estimate of \$1177.00 to remedy this defect.

This Tribunal agrees with the submission by counsel for the Program that the onus of proof is upon the Applicants to persuade this Tribunal, upon the balance of probabilities, that the original vendor breached a warranty under the Act.

Upon all the evidence presented, this Tribunal finds that the Applicants have not discharged this burden of proof. By the Applicants' own evidence, his builder, Brieland Homes, could find no apparent defects in work or materials in the flooring as installed by Lepp & Sons. Neither the Program nor the Applicants is certain as to which builder is responsible for the defect, nor what is the cause of the defect. The onus is upon the Applicants to present some evidence that the original vendor failed to construct the floors in a workmanlike manner and free from defects in material, as required under the Act. In the absence of such evidence, this Tribunal finds that the Applicants' breach of warranty claim is not compensable under the Act.

Financial Loss Claim

In order to be compensable, a financial loss claim must meet the criteria set out under section 14(1)(a) of the Act. This section is set out below for ease of reference:

14.(1)(a) Where a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

The first issue to be determined is whether the Applicants suffered a financial loss resulting from the vendor's failure to perform the contract.

Counsel for the Program argued that financial loss should be calculated in a manner consistent with the purpose of the Act. Under the Act, the Program steps into the shoes of the defaulting vendor and provides warranties for that vendor's work only. The Program does not provide warranties for the work performed by a subsequent builder because that builder does not meet the definition of "builder" under the Act, as a "person who undertakes the performance of all the work and supply of all the materials necessary to construct a completed home" (emphasis added).

According to counsel for the Program, to calculate financial loss consistently with the Act requires that the financial loss, if any, must be assessed as it exists at the time of the breach. The Program, in its decision letter of April 21, 1993, thus calculated that the Applicants, at the time of the contract breach, had suffered no financial loss. On the contrary, the Applicants, according to the Program, had benefitted from the contract breach in the amount of \$26,906.86, as follows:

Contract Price	\$188,500.00	
Estimate of work in place		\$106,254.00
First instalment paid	\$55,800.00	
Lien payments	\$23,210.00	
Air conditioning	\$ 337.05	
	<hr/>	
	\$79,347.14	
		\$ 79,347.14
		<hr/>
		\$ 26,906.86

Mr. Parker of the Program also defended the practice of calculating financial loss at the time of the contract breach upon the basis that the Program has no control over the costs incurred in completing the house, after the contract breach. Thus, that liability for the Program is less predictable, as opposed to liability based upon the contract price minus a valuation of work in place at the time of the contract breach.

Counsel for the Applicants argued that section 14(1)(a) of the Act should be interpreted liberally in a manner consistent with the remedial nature of the Act. Referring to McGregor on Damages, c.6, Remedies for Breach, he argued that the fundamental purpose of awarding damages for breach of contract is as follows:

The principal purpose of damages is to put the injured party, so far as money can do so, in the same position as if his rights had not been violated....

In this case, section 14(1)(a) should be interpreted to provide full compensation to the Applicants in order to put them in the same position as if their contract rights had not been violated. Referring again to McGregor on Damages, he cited the following passage at p.6-8:

The purpose of an award in damages is to grant full compensation, not to award a windfall,.... In many cases, the cost of completing or correcting the work, over and above the contract price, will be the proper measure of damages. This may particularly be the case when the contractor has failed to complete the work, rather than performing defective work.

It is usually more costly to call in another contractor in the course of work to complete it and such additional costs must be borne by the defaulting contractor if it is reasonable for the owner to incur such costs and he has done so or it is likely he will do so. Any moneys unearned by the defaulting contractor under the original contract must be credited towards completion, since this money would in any event have been payable by the owner; but any excess over this amount represents the loss suffered by the owner as a result of the breach.

This Tribunal agrees that the Applicants have clearly suffered a financial loss in accordance with the fundamental common law principles in assessing damages for breach of contract.

Mr. Maskaluk's testimony was credible to this Tribunal, which finds that the Applicants expended the amount of \$123,426.07 for the completion of a home substantially similar to the home for which the Applicants contracted under the Building Agreement. The Tribunal also accepts that the other expenses noted above were incurred by the Applicants.

The Tribunal also found the testimony of Mr. Ellwood to be credible and informed by his 25 years of experience in the construction industry. He testified that he believed that "changing horses mid-stream" will result in increased costs; however, he stated that completing the Maskaluk's home was his first project requiring him to complete the work of another builder. In general, his testimony corroborated the costs claimed by the Applicants.

It is agreed that a fundamental obligation of the injured party is to mitigate his or her damages for breach of contract, acting reasonably under all the circumstances. In the view of this Tribunal, the Applicants mitigated their damages very reasonably under all the circumstances. The Applicants adopted a reasonable course of action when confronted with their vendor's contract breach: they properly notified the defaulting parties and the Program of their intentions to mitigate their damages; they moved promptly and effectively in engaging a competent contractor to complete the construction of their home in a manner substantially similar to what they had bargained for under the original contract.

However, this Tribunal finds no persuasive evidence that the amounts expended by the Applicants towards GST to their subsequent contractor (the "GST expense") was a foreseeable head of damages to be borne by the defaulting vendor. The issue of which party was responsible for the payment of the GST was not within the contemplation of the parties at the time of the making of the original Building Agreement. The Undertaking of 703225 Ontario Inc. alone on March 12, 1991, to pay specified and limited amounts of the total GST payable is not sufficient to amend the original Building Agreement for "the provision of a home".

Thus, in the view of this Tribunal, the Applicants' financial loss resulting from the breach of contract must be reduced by the GST expense. This must be borne by the Applicants because it is an expense in any event payable by them, and not a loss from a contract breach.

The next question is whether the Applicants have suffered

a "financial loss" within the meaning of section 14(1)(a) of the Act? In the view of this Tribunal, the answer is yes.

Section 14(1)(a) does impose certain statutory limits upon the assessment of loss or damages for breach of contract as they are calculated properly at common law. For example, the loss must be "financial" to be compensable under the Act. Thus, damages for mental stress, which under certain circumstances are compensable at common law for breach of contract, would appear to be non-compensable under the Act. Also damages for trivial breaches of contract would appear to be excluded because of the difficulty in proving "financial" loss.

However, this Tribunal finds there is no such statutory limitation upon the assessment of the Applicants' financial loss as argued by counsel for the Program. There is no requirement that losses be calculated at a specified point in time, with the result that those losses are diminished to limit compensation payable to the consumer.

On the contrary, to calculate financial loss consistently with the Act, which is remedial in nature and designed to protect the public, would seem to require that such loss be calculated, subject to explicit statutory limits, in such a manner as to put the injured party, so far as money can do so, in the same position as if his or her rights had not been violated by the contract breach.

Accordingly, subject to the limitations noted below, this Tribunal finds that the proper measure of the Applicants' financial loss resulting from their vendor's failure to perform the building contract is the cost of completing a similar home, being \$207,056.92, minus the GST expense, agreed by the parties to be \$11,535.15, and minus the original contract price for the home of \$188,500.00. The total financial loss is then \$7021.77.

"Person" and "Owner"

Counsel for the Program argued that section 14(1)(a) does not apply to the Applicants because once the Applicants closed the transaction, they became "owners", with the capacity to claim under section 14(1)(b) or (c), but not section 14(1)(a), which only applies to those "persons" whose transactions do not close.

Counsel for the Applicants argued that "person" is not defined in the Act and has broader meaning than "owner", which is defined under section 1(g) as "a person who first acquires a home from its vendor for occupancy, and the person's successors in title" (emphasis added).

It is clear that section 14(1)(b) applies to the Applicants' circumstances because it is that section that permits them to bring forward their claim for compensation for breach of warranty respecting the squeaky floors.

Counsel for the Program cited the cases of Legacy, (1991) 21 C.R.A.T. 790, and Chalker, (1991) 21 C.R.A.T. 586, in support of the proposition that a claimant has either a claim under section 14(1)(a) as a "person", or a claim under section 14(1)(b) or (c) as an "owner" but cannot assert both.

Contrary to this proposition, this Tribunal notes the Hunt case, (1991) 21 C.R.A.T. 733, in which the Tribunal states at p.736:

The Applicants argued that while it is true they are an owner under the terms of the Act, they are also a person which is not a defined term and that section 14(1)(a) of the Act is much broader than clauses (b) and (c), in that it would encompass not only a person who failed to become an owner, but would also encompass an owner since they are persons who have entered into a contract with a vendor. If that, in fact, is the case, then the Applicants would have a claim under clause 6(1) of the Regulations if they could show a financial loss.

The Tribunal is of the view the position of the Applicants is correct and that if the Applicants could have shown that they had suffered financial loss, their claim for this item would have properly been allowable.

This Tribunal with respect prefers the interpretation found in the Hunt case. "Owners" are also "persons" for the purposes of the Act.

It is agreed that a person who is unable to close the transaction cannot recover compensation under section 13(1) or section 14(1)(b) or (c) because that person is not an "owner" under the Act. However, this Tribunal finds that the Legislature can be viewed as having intended by means of section 14(1)(a), not only to provide a basis for recovery of compensation to persons who could not recover under section 13(1) or section 14(1)(b)(c), but also to provide a basis for the recovery of certain types of provable and

allowable losses, namely "financial loss resulting from the ... vendor's failure to perform the contract".

Thus, this Tribunal concludes that section 14(1)(a) applies to the Applicants here to support their claim for financial loss.

Regulatory Limits

This Tribunal has concluded that the Applicants are entitled to be paid out of the guarantee fund the amount of \$7021.77, "subject to such limits as are fixed by the regulations".

These limits are set out under section 6 of Regulation 892. Both of the relevant subsections, being 6(1) and (7), were in force during the relevant time. For ease of reference, the subsections are set out:

6(1). A purchaser who has a claim under clause 14(1)(a) of the Act in respect of a purchase agreement entered into after the 30th day of June, 1988 is entitled to be paid out of the guarantee fund an amount for the damages arising from the breach of the agreement by the vendor that does not exceed \$20,000.

6(7). Liability in respect of the cost of completion of a home is limited to 2 per cent of the sale price of the home or \$5000, whichever is the greater. R.R.O. 1990, Reg. 892, s.6(5-7).

Counsel for the Applicants argued that section 6(1) applies and not section 6(7) because the former deals specifically with a section 14(1)(a) claim, which is at issue here.

However, the Applicants' compensable financial loss arose directly "in respect of the cost of completion of the home". Thus, this Tribunal finds that section 6(7) of Regulation 892 is directly applicable. Two percent of the sale price of the home, being \$188,500, is \$3770; therefore, liability is fixed at \$5000.

The result is that \$5000 is the maximum compensation permitted under the Act and regulations thereto, which is payable to the Applicants' for their financial loss in completing their home as a result of the vendor's breach of contract. This Tribunal is bound to apply the limits set by the Act and regulations thereto, despite sympathy for the Applicants, who mitigated their losses most reasonably.

This Tribunal therefore by virtue of the authority vested in it under section 9(4) of the Ontario New Home Warranties Plan Act hereby directs the Ontario New Home Warranty Program to allow the Applicants' claim for financial loss subject to the limit of \$5000.00 payable under section 6(7) of Regulation 892.

The above decision was appealed to the Ontario Court (General Division) Divisional Court. The appeal had not been concluded at the time of this publication.

SIDNEY ANTHONY MASON

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JACINTH HERBERT, Vice-Chair, Presiding
GORDON R. DRYDEN, Vice-Chair as Member

APPEARANCES:

SIDNEY ANTHONY MASON, appearing on his own behalf

RICHARD CARTY, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 28 January 1994

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal by Sidney Anthony Mason from a decision of the Ontario New Home Warranty Program. The decision letter dated August 16, 1993 denies his claim for damages based on a major structural defect.

The Applicant took possession of his home at 311 Kirby Avenue, Newmarket, in May of 1989. At the time the property was new. The Applicant claims that on November 22, 1992 he wrote to the Ontario New Home Warranty Program and advised them that he was having difficulty with his garage floor. The Applicant claims that he never heard back from the Program and by way of letter dated April 30, 1993 he again advised the Program of his difficulties.

The Applicant states that continuing from that period until now his garage floor has greatly subsided with the outside parameters falling two inches and the middle falling in the range of three to six inches. The Applicant further claims that these defects caused gas fumes to enter into his dwellings. According to the Applicant, the Program has caulked the outside area of the garage floor in order to rectify this problem. The Applicant did not present any evidence which would suggest that the fumes continue.

The Program does not acknowledge receipt of Mr. Mason's letter of November 22, 1992. The Program does acknowledge receipt of the letter dated April 30, 1993 and responded by way of letter dated May 17, 1993. In that letter Ms. Bonnie Douglas the Co-ordinator of the Program states:

Under the provisions of the Ontario New Home Warranties Plan Act, all new homes sold in Ontario have basic warranty protection against substandard workmanship, defective materials and Ontario Building Code violations. These matters are covered by the builder for one year commencing on the date of possession by the first owner. All claims arising out of the builder's first year warranty must be received in writing by the Ontario New Home Warranty Program during the first year of possession. Basement leakage is covered for two years from the original date of possession...

Your complaints do not appear to fall within the definition of a major structural defect. We require more relevant and detailed information to be of assistance.

On June 11, 1993 Mr. Mason responded to this letter and indicated to the Program that his matter warranted a more thorough investigation.

On July 19, 1993 Mr. Scott Rowand, an investigator from the Program, and Mr. George Thomas, a representative from the builder, attended at Mr. Mason's home to inspect the alleged damage. Mr. David Betts' letter of August 16, 1993, communicated to Mr. Mason that his claim was denied for the following reasons:

As a result of our inspection it was evident that the garage concrete floor slab has subsided causing a negative slope of the floor as well as rendering the gas-proofing around the closet area inadequate. Damage to adjacent foundation walls, brick veneer, drywall and/or structural framing were not evident.

DECISION: Your claim is not considered a major structural defect nor was it submitted within the prescribed periods for other warranty coverage and must therefore be denied.

The Applicant's evidence before the Tribunal was brief. Appearing as his only witness, the Applicant gave oral evidence as to the condition of his garage floor. He argued that one of the

purposes of a garage is to fix a car and that he is unable to do so and therefore the damage to his floor affects materially and adversely the purpose for which the garage was intended.

Mr. Scott Rowand testified on behalf of the Program. Mr. Rowand is the Program's representative who inspected Mr. Mason's home. In his testimony Mr. Rowan reiterated the Programs conclusions that no major structural defect could be found.

Counsel for the Program, Mr. Carty, argued that the Applicant failed to provide any evidence which would support his allegation that a major structural defect exist. Acknowledging that the garage floor has some problems, Mr. Carty stated that the garage could still be used for the purpose it was intended, parking a car, and further stated that Mr. Mason's difficulties were a mere inconvenience.

DECISION

There is no doubt that if the Applicant had brought his claim within the first year of possession he may have had some success under subsection (4) of section 13 of the Act.

Given the fact that his claim is brought outside of this period, he can only succeed if this tribunal determines that he has "a major structural defect".

The relevant sections of the Act are 13(1)(b) and 14 (1)(c).

Section 13(1)(b) provides as follows:

Every vendor of a home warrants to the owner,

(b) that the home is free of major structural defects as defined by the regulations...

Section 1 of Regulation 892 under the Ontario New Home Warranties Plan Act provides:

(o) "major structural defect", means, for the purposes of clause 13(1)(b) of the Act, any defect in work or materials,

(i) that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or

(ii) that materially and adversely and adversely affects the use of such building for the purpose for which it was intended,

including significant damage due to soil movement, major cracks in basement walls, collapse or serious distortion of joints or roof structure and chemical failure of materials, but excluding flood damage, dampness not arising from failure of a load-bearing portion of the building...

Section 14(1)(c) of the Act provides:

14(1) Where,

(c) the owner suffers damage because of a major structural defect as defined by the regulations for the purposes of section 13, and the claim is made within four years after the warranty expires or such longer time under such conditions as are prescribed, the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

Based on the evidence produced, we are unable to make a finding that the subsiding of the Applicant's garage floor constitutes a major structural defect. There is no evidence confirming that the change in the floor is the result of any defect in work or materials resulting in a failure of the loadbearing portion of the building or materially or adversely affecting the building's load-bearing function. Further, the evidence does not establish that the defect in the garage floor materially and adversely affects the use of the building for the purpose for which it was intended.

Therefore by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow this claim.

JOHN AND JULIE MAYCOCK

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID APPEL, Vice-Chairman, Presiding
JACINTH HERBERT, Vice-Chair as Member
HANS G. KEPPLER, Member

APPEARANCES:
JOHN AND JULIE MAYCOCK, appearing on their own behalf

STEPHEN AUSTIN, representing the
Ontario New Home Warranty Program

DATE OF 1 October 1992
HEARING: 28 January 1993 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program dated May 22, 1991 rejecting various claims of the Maycocks with respect to their home. The claims were based on Section 13(1)(a) of the Act and Section 14(1)(b). The Maycocks claimed that the builder had breached certain statutory warranties with respect to the construction of the home.

The first witness to testify was Mr. John Maycock who said that he had bought a new home from the builder on November 30, 1989 for \$130,000.

He stated that certain problems still remained with the home for which claims were made against the Program within the one year time limit. The problems are as follows:

1. Basement

Mr. Maycock testified that although the problem of leaking had been solved, the floor still sloped towards the northeast corner. He estimated the slope to be 2cm over its full length. There were also holes in the floor which he sought to be filled by hydraulic cement. He testified that the builder had promised to fill the holes, but failed to complete the job. It is to be noted that there is no leakage occurring as the result of these holes. Finally Mr. Maycock complained about cracks in the basement floor described as being hairline.

2. Bathroom

Mr. Maycock testified that the tile caulking was poorly done. Because it was uneven, it began peeling away in sections on all three sides where the tile joined the bathtub. The builder had promised to repair this problem, but failed to do so. All the builder did was to send a person with a tube of caulking, but no gun. The builder stated that Mrs. Maycock sent them away because she wanted to do the repairs, an allegation which Mr. Maycock says was false.

Mr. Maycock tried to have the repair done but without success. He asked that the Program perform the repairs around the bathtub.

3. Drywall under bay window at front of home

Mr. Maycock testified that there was flashing missing which caused leaking. This was repaired but damages caused by the repairs were not repaired. The drywall under the window on the inside has buckled and is stained. Mr. Maycock asked that the Program repair it because it is unsightly. The paint is also blistered. The Program refused the repairs saying the stains came from condensation.

4. Dining room and three bedrooms brick window sills

Mr. Maycock alleged that the sills did not slope out and down far enough on the outside. As a result, water sits on the brick, as does snow, and results in water causing stains on the inside walls under the window on the west wall especially but not on the south wall.

The Program claimed that the problem resulted from condensation from within the home because water could not flow upwards from the sills to the inside of the home. The Program also argued that the sills' slope satisfied the requirements of the Building Code.

5. Ventilation

Mr. Maycock testified that there was no ventilation to the outside from the kitchen; there was only an interior vent. This results in the kitchen window steaming up and causing vapour. When asked, Mr. Maycock testified that the building contract did not specify that an outside vent was to be installed.

In cross-examination, Mr. Maycock stated that with respect to the problem of the sills, there had been no leaking observed in 1992 and this, despite the fact that it had been a very rainy spring and summer. He could offer no reason why the problem would have ceased under those conditions.

Mr. Maycock also testified that the humidifier was on when the Program came to inspect his home and that it had been allowed to run continuously. Since that visit, however, he kept the humidifier off.

Mrs. Maycock testified next and corroborated the testimony of her husband. She also stated that she had never agreed to do the caulking in the bathroom herself.

Mr. Richard Johnston, warranty representative with the Program, was the first witness for the defence. The witness has a great deal of experience in construction and carpentry. He performed the inspections.

He stated that the first inspection was to take place on January 23, 1991, but no one was home when he came and, therefore, it was deferred until March 20, 1991.

He testified that no complaint had been made to the Program with respect to the ventilation and that the claim was, therefore, beyond the statutory one year limit.

He performed a reinspection on May 16, 1991 and issued his report on May 22, 1991. His findings were as follows:

1. The basement floor

He found the cracks in the basement floor were normal and resulted from shrinkage; they were, therefore, not covered by the Act. It was an unfinished basement floor which satisfied the requirements of the Building Code.

2. Bathroom caulking

He corroborated the testimony of the Maycocks in that he himself saw that the caulking had started to separate in certain areas. It was damaged. He stated that the Program had rejected the homeowner's complaint because it was treated as being homeowner maintenance.

3. Problem of condensation

Mr. Johnston stated that when he entered the home he detected a distinct odour, a "musty smell" - especially in the basement. He found that there was a very high level of humidity in the home, a level he did not come across too often. There was a great deal of moisture on the walls and floor even though the weather outside was dry and warm. He concluded that the problem could only have resulted from condensation from within the home, a problem to which homes of this type were particularly susceptible because they were so well insulated. The homeowner had to be sure to keep windows open, fans functioning and the humidifier not running in order to prevent condensation. The Maycocks, on the

other hand, had allowed their humidifier to run and the windows were not kept open for a sufficient amount of time.

4. Window sills

He testified that the slope of the sills satisfied the Ontario Building Code and, therefore, were not subject to warranty.

5. Damage to drywall

Mr. Johnston corroborated the testimony of the Maycocks with respect to the damage to the drywall under the bay window. He did not know what caused the damage but had refused the claim because he presumed it came from condensation. He went on to state that water tests were performed on the windows to make sure that they didn't leak. No leaks were perceived. He himself saw water running off the sills during the test rather than into the house.

6. Slope in basement

The witness testified that a 1/2" slope was not excessive and did not reflect poor workmanship. The slope would have to exceed 1-2" to constitute poor workmanship. It caused no damages to the basement. The problem could have been eliminated had the Maycocks chosen to install a hardwood floor rather than to leave the basement floor unfinished.

The next witness to testify was Mr. Peterman, a consulting engineer since 1971. He visited and inspected the Maycock's home on February 20, 1992 and prepared a report filed as Exhibit 4 in tab 8 and dated February 24, 1992.

He found no leaks or big cracks anywhere in the home. The home had a humidifier system which operated on an on/off basis. He found no venting from the kitchen because no exterior vent had been installed.

He went on to state that air circulation was an absolute requirement to counteract condensation. Because of the very high degree of insulation in the home, mildewing will result if there is not sufficient air circulation. He felt that this was the source of the Maycock's problem. As to the slope in the basement floor, he found it acceptable and within the range required. The basement floor itself was in typical condition for an unfinished floor. All such floors will have cracks. They were hairline in nature and none were significant.

He went on to state that he saw no evidence of leakage even though he had visited during a very rainy period. He saw no wetness on the basement floor and no water along the cracks or anywhere else.

He did find the home to be humid and to have a humid odour. The level of 60% humidity was excessive. As a result, he saw condensation on windows.

He did not ascribe any of these problems to deficiencies in construction, but rather because the house was built in a very air tight fashion. It required a great deal of air circulation to get the humidity out. If on the other hand, the humidifier was allowed to run, the humidity level could go up to 70% which would compound the problem of condensation and moisture. He went on to state that the humidifier was operating when he visited the premises and would run whenever the furnace itself was operating.

In cross-examination, Mr. Peterson testified that the mould staining seen on the windows would have been caused by condensation.

On the final day of hearing, a further problem was raised of water coming down from the windows into the basement. But the evidence showed that the water had entered during a time of extremely rainy conditions. There had been 1 1/2" of rain blown against the windows steadily at an average speed of more than 30 miles per hour. This is the only time that leaking occurred.

The Tribunal finds as follows with respect to the claims of the Maycocks:

1. Basement

The Tribunal finds that on the evidence presented, the slope in the floor satisfied the requirements of the Ontario Building Code. As to the cracks and small holes in the floor, the cracks were hairline in nature and resulted from shrinkage. For this reason, they would not be covered by the Ontario New Home Warranties Plan Act. That the cracks were not serious in nature is fully demonstrated by the fact that there was no leakage in the basement.

The Maycocks must bear in mind that they are dealing with an unfinished floor in the basement and that their complaints would be of a type made for a floor which was finished. All the evidence has shown that the home was constructed in a workmanlike fashion.

2. Caulking in bathroom

The evidence demonstrated that the Maycocks had only attempted to do repairs on the caulking when the builder and the Program refused to do them. The problem came into existence almost immediately and, therefore, constituted a builder's defect.

The Tribunal, therefore, orders the Program to carry out the repairs necessary to the tiles and caulking in the bathroom.

3. Drywall under bay window at front of house

The evidence demonstrated that it was the repairs to the flashing which caused the damages to the drywall under the window. Doing repairs to the wall was not sufficient; the wall had to be also returned to its original state. The Tribunal, therefore, orders the Program to carry out all the repairs necessary to the drywall under the bay window at the front of the house so that it is no longer buckled and all stains are removed. The paint should not be blistered after being reapplied.

4. Dining room and three bedroom's brick window sills

From the evidence presented, the Tribunal finds that the sills were constructed in a manner which satisfies the Building Code. The problem of condensation is in no way attributable to the window sills. The evidence of all the experts indicates that the slopes were built in a workmanlike manner. The burden of proof was on Mr. Maycock to prove any deficiency in the slope and this he has failed to do.

5. Ventilation/condensation problem

The Tribunal finds that the Maycocks did not stipulate in the contract of purchase that there should be ventilation to the outside provided by the builder in the kitchen. There is also no provision in the Ontario Building Code which requires the builder to install such ventilation.

From the evidence it is clear that the problem of moisture and condensation is one that did not result solely from the kitchen, but exists everywhere in the home. On the evidence presented by the Ontario New Home Warranty Program through its experts and from the testimony in general, it has been clearly established that the problem of condensation does not result from a deficiency in the construction of the home.

It is in evidence that the home built satisfies the new norms set for homes which are very highly insulated. These homes are known to be susceptible to condensation if the owner is not careful. Because of the air tightness, the homeowner must be certain to install proper ventilation, keep windows open, and not operate the humidifier when a certain level of humidity is reached. The evidence demonstrates that the Maycocks allowed the humidifier to operate even at times of high humidity. Windows were not left open long enough to allow the air to circulate. This created the problem of high humidity and condensation within the home. From the tests performed by the Program, it is clear that no leakage was occurring from the outside to the inside. The problem, therefore, had to come from within the home.

The burden of proof was on the Maycocks to clearly establish that the problem complained of occurred because of deficiencies in construction. All the expert proof has been to the contrary. The Tribunal finds, therefore, that Mr. Maycock has not proved his case with respect to this item.

Accordingly pursuant to the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal orders the Program to carry out the repairs necessary to the caulking in the bathroom; to carry out all the repairs necessary to the drywall under the bay window at the front of the house so that it is no longer buckled and all stains are removed; and the Tribunal further directs the Program to disallow items 1, 4 and 5.

RICHARD MEECH JR.

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding

APPEARANCES:

S.H. LEITL, representing the Applicant

BRIAN M. CAMPBELL, representing the
Ontario New Home Warranty Program

DATE OF

HEARING:

6 December 1993

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal by the Applicant from a decision of the Ontario New Home Warranty Program set out in a letter to the Applicant dated July 27, 1992. The fact situation is somewhat unusual and gives rise to some nice legal questions.

The Applicant is a documentary film maker and has been involved in this business for a number of years. His business has taken him to locations in many parts of the world to make films and this has resulted in his spending a good deal of his time out of his office in Toronto and frequently out of the country. At all material times, he was a principal in a company, Meech Grant Productions Ltd., which had an office in the Toronto Dominion Centre in Toronto and later moved to 74 Avenue Rd. in Toronto. This office space was shared by another company, Northwood Communications Ltd. in which Mr. Grant was a principal, but with which Richard Meech had no connection.

There worked for this other company one Roger Lapworth who described himself as a tax consultant and a financial adviser who was by training an accountant. He was not employed by the Applicant or by Meech Grant Productions Ltd., but he worked in the same office with Mr. Grant and was well known to the Applicant. During a period of time, Roger Lapworth lived with one Indra

Narine, who was a registered real estate agent employed with a broker which was retained by the Markan Group Inc., the vendor/builder of the condominium homes with which we are concerned here for the purpose of selling the same for it. This relationship between Mr. Lapworth and Indra Narine existed during the period of time with which we are concerned and Richard Meech was acquainted with her because she came into the office with Mr. Lapworth occasionally.

In December 1988, Richard Meech was living with his brother Peter Meech in a house which they owned at 367 Spadina Avenue in Toronto. By that time, reasons had developed whereby they were interested in selling this property and finding somewhere else for each of them to live.

At this point, Roger Lapworth talked to both Richard and Peter Meech and to Mr. Grant about this condominium apartment building which a company called Gotovac Holdings Inc. was building in Brantford and concerning which Indra Narine was acting as agent for the sale of the units when built. Roger Lapworth told the Meech Brothers and Mr. Grant that Indra Narine could get them in at this early stage at a very good price and all three made offers to the vendor/builder to purchase a unit.

On December 21, 1988, both Peter Meech and Richard Meech signed offers to purchase units 610 and 607 respectively in the building to be built. (see tabs 2 and 3 of Exhibit 25) The evidence indicates that these Offers were prepared either by the vendor or by the real estate agent, brought home by Indra Narine who either came with Roger Lapworth to the office to get the Offers signed by the purchasers or gave them to Mr. Lapworth to take in and get them signed. In any event, she got them back signed and took them to the vendor, the Markan Group Inc. It is to be noted that Indra Narine's signature appears as a witness to the signatures of both Peter and Richard Meech on these documents.

Another fact which must be considered is that on the Offer to purchase unit 610 at the very top, following the name of the offeror, Peter Meech, appear the words "In Trust for Richard Meech". There is some question on the evidence just when this came about.

It was the evidence of Richard Meech that, after the Offers were signed and a substantial delay in the building of the building intervened, his brother Peter found himself in some difficulty to make the required payments and discussed this with him and that he, Richard Meech, agreed to "take this unit over" as well and as a result he, Richard Meech, paid his brother the \$5,000

he had initially put down as a deposit and through either Roger Lapworth or Indra Narine directly advised the vendor of this change. It was the evidence of Joseph Gotovac that these words were on the Offer from Peter when he first got it and signed it. Both parties agreed that, whenever these words were put on, it was the vendor's agent which had them added and not someone of behalf of either of the Meech brothers.

Upon this evidence the Tribunal finds that, well before the difficulties which led to the claim upon the Program arose, the vendor was fully aware that, with regard to unit 610, the actual purchaser was Richard Meech.

The Offer from Peter Meech in Trust for unit 610 was for a total price of \$114,500.00 and that from Richard Meech for unit 607 was for \$108,100.00. Both contained provisions for an initial deposit of \$5,000.00 with the Offer and an additional deposit of \$5,000.00 ninety days thereafter. The initial deposits were paid by each of the brothers respectively and the cheques were cashed by the vendor. As aforementioned, Richard Meech was reimbursed by his brother for his \$5,000.00 paid so that by the time the second deposit amounts were due he, Richard Meech, was the purchaser of both units and owed both amounts.

For reasons which do not affect any issue herein, the purchasers were given some extra time to pay these second deposits. When these were payable on June 7, 1989, Mr. Grant was away and it was arranged by him that Richard Meech would cover his payment on his unit as well and get it from him later and so on June 7, 1989, Richard Meech issued a cheque to Markan Group Inc. for \$15,000.00 which was cashed by that company covering all three second deposits of \$5,000.00 for the three units. (see tab 7 of Exhibit 25)

Upon all of this evidence, the Tribunal finds that Richard Meech paid the \$20,000.00 by way of deposits upon the purchase of these two condominium units and that the vendor knew that he was, in fact, the purchaser of both and that it had accepted the deposit money. In fact, the vendor never denied any of these facts, but took the position that by reason of circumstances to which I shall refer, it was entitled to forfeit and keep this deposit money.

The Offer of Purchase and Sale for unit 610 provided for a closing date of June 30, 1990 and that for unit 607 for a closing date of June 29, 1990. In both of these Offers, paragraph 6 reads:

6. If the property is not substantially completed by the closing date for any

reason whatsoever beyond the Vendor's control, or otherwise, so that the Purchaser cannot be given possession thereof on such date, then the Vendor, at its sole option shall be entitled to extend the closing date for one or more periods not exceeding in total 15 months, or alternatively, the Vendor may at its sole option declare this Agreement null and void, in which event the deposit shall be returned to the Purchaser, without interest or deduction and the Vendor shall not be liable for any costs or damages suffered or incurred by the Purchaser thereby.

June 29 and 30, 1990 came and went with no action being taken by the Vendor to close the transaction or to extend the closing date pursuant to this provision or to communicate with the Applicant purchaser in any way with an explanation of what was going on or otherwise. Equally the dates came and went with no action on the part of the purchaser, either to attempt to close the transactions, or to attempt to cancel the transactions and get his deposit money back, or even to find out what was going on.

Paragraph 24 found in both contracts reads:

Time shall be of the essence in this Agreement in all respects, and any waiver, extension, abridgement or other modification of any time provisions shall not be effective unless made in writing and signed by the parties hereto or by their respective solicitors who are hereby expressly authorized in that regard. This Agreement shall enure to the benefit of and be binding upon the parties hereto, and their respective heirs, executors, administrators, successors and permitted assigns.

Upon the evidence aforementioned, the Tribunal finds that by this conduct leading up to and following the date fixed for closing both parties waived their rights to rely upon time being of the essence, although in other respects the transactions were still alive and affording to each party the benefits and the obligations which they otherwise had. Unless and until something

happened to bring the whole of each transaction to an end, either party could have reinstated a closing date thereafter and made time again of the essence with regard to it by giving reasonable notice to the other party of this intention. However, this was never done by either of them.

The vendor did take action later to attempt to close the transaction by instructing the agent Indra Narine to contact the Applicant on December 7, 1990 and tell him that the building was now ready and the deals could be closed and advising him that he had to be ready to close and to close the transactions in three days on December 10th. The Tribunal does not find this action to comprise what would have been necessary and effective action on the vendor's part to fix a new closing date and make time of the essence. This notice came from the real estate agent and not the vendor and was not in writing but the Tribunal does not have to decide whether these facts are fatal to its effectiveness because, in any event, only three days notice in these circumstances was not reasonable and this action was therefore ineffective in any event on this ground.

By reason of the falling market in real estate, the vendor had difficulties with the closing of other units in the building besides these two and on August 14, 1992, the two units were transferred to two companies which were the owners of The Markan Group Inc. - unit 610 to Presland Investments Inc. and unit 607 to Ines Developments Inc., both companies owned and controlled by Mr. Joseph Gotovac. Mr. Gotovac said in his evidence that the building was taken over from his companies by the Toronto-Dominion Bank and the unit register in the Registry Office for both units, (Exhibits 30 and 31), showed them sold to third parties for \$97,663.55 for unit 610 and \$95,000 for unit 607, both reflecting a drop in price from that at which they were initially sold to the Applicant.

After the demand was made upon the Applicant early in December 1990 to close the transactions in three days, he went to a solicitor, Mr. Thomas Baulke, who wrote to the vendor's solicitors on December 19, 1990 stating that the disclosure statement required by section 52(1) of the Condominium Act was never delivered by the vendor to the purchaser and, on this basis the purchaser was rescinding the contract and demanding the return of his deposit money. This letter referred only to unit 607. Mr. Baulke subsequently became aware of the transaction concerning unit 610 and wrote again on January 8, 1991 to the same effect with regard to this unit. To deal with this present point, we must look at the evidence relating to it and the provisions of the Condominium Act. It was the clear and unequivocal evidence of the

Applicant that he never received any disclosure statement at any time and further that there was never any discussion of it with him as was suggested by Robert Lapworth.

One other thing which happened in March of 1990 becomes of some importance on this issue. At that time, Richard Meech discussed with Roger Lapworth his intentions with regard to the two units. Mr. Lapworth had known the previous December that the two Meech brothers might be interested in moving into these homes. The Applicant told him in March that he might be interested in getting tenants in the units and since he was away so much, he spoke of arranging with Mr. Lapworth to look after this business for him and he also spoke of perhaps wishing to resell the units, hopefully at a profit. At that time, he still believed he had been given a favour of getting in to buy the units at the prices stipulated and he said to Roger Lapworth that he understood what Indra Narine would get out of it, mainly her real estate agent's commission, but he thought Roger Lapworth should have something too for what he had done. As a result of this discussion, the two of them agreed on a letter which the Applicant would send Lapworth undertaking that the latter would get 10% of any net profit realized by Richard Meech on the sale. This letter was dictated by Mr. Lapworth, typed on a company letterhead of Richard Meech and signed by him and reads:

This is to confirm our understanding regarding your acting on my behalf as a consultant with regard to certain real estate investments in Canada.

It is understood and agreed that you will receive 10% of any equity growth net of real estate commissions only on any of such investments on which you have acted as consultant.

It was the evidence of Roger Lapworth that when it came to the matter of delivering the required disclosure statement to these three purchasers, Grant and the Meech brothers (it was not established at exactly what point in time the event described took place, but it is to be noted that Lapworth considered at that time that Peter Meech still should get a copy of the statement). He was told by the representative of the vendor dealing with this matter that they only had a few copies of this document and a 141 units in the building and it was suggested that since Grant and the two Meechs were in the same office, one copy would do for all of them and Lapworth proceeded on this basis. Roger Lapworth said that he

gave this copy to Grant and told him that it was to be shared with the other two and that he, Grant said he had no problems with this. Mr. Lapworth then said that he mentioned to one of the Meechs that Grant had the document and he should get it from him or in any event see it. Mr. Lapworth first said that he mentioned it to Peter Meech and later said he believed it was Richard Meech, and after further questioning, he was not sure which one. As aforementioned, Richard Meech denied emphatically that Roger Lapworth had ever mentioned anything about the disclosure statement to him. It was the evidence of Mr. Gotovac that both Roger Lapworth and Indra Narine confirmed to him that the disclosure statement went to all of these people.

Counsel for the Program urged upon the Tribunal the submission that it should find on this evidence that Richard Meech did get the statement, pointing out that he has a substantial interest in having his side of the issue accepted and Roger Lapworth has no interest in having his side accepted. The Tribunal, however, prefers the evidence of Richard Meech on this point. He appeared to give his evidence in a straightforward and forthright manner and did not attempt to escape from facts which were not to his advantage and he was absolutely certain in his evidence that nothing came to his attention concerning any disclosure statement. On the other hand, Mr. Lapworth was much less certain of any facts which would lead to the opposite conclusion. It is clear that he did not give a copy to Richard Meech, but only to Grant and he was not certain he spoke of it to Richard Meech while the latter was certain that he did not.

I should deal with another point which arises from this. If the evidence of Roger Lapworth is to be accepted, that he did mention to one of the Meechs the fact that he had given of the disclosure statement to Grant and the evidence of Richard Meech be accepted that it was not mentioned to him, there is an inference that he mentioned it to Peter Meech. In either case, I would not find that giving a copy of the required statement to a third party and then simply mentioning that he had done so to Peter Meech who at one stage was a trustee for the Applicant or even simply mentioning the fact to the Applicant without giving him a copy of the statement, would constitute sufficient delivery of the statement to comply with the requirement of the statute. On all of this evidence, the Tribunal finds that the vendor of these units as the term is defined in section 1 of the Condominium Act, did not deliver to Richard Meech as purchaser a copy of the current disclosure statement or of any material amendments thereto as required by section 52 of the Condominium Act.

Section 52:

- (1) An agreement of purchase and sale entered into after the 1st day of June 1979 by a declarant or proposed declarant of a unit or proposed unit for residential purposes is not binding on the purchaser until the declarant or proposed declarant has delivered to the purchaser a copy of the current disclosure statement and all material amendments thereto.
- (2) The purchaser, before receiving delivery of a deed to or transfer of the unit, may rescind the agreement of purchase and sale within ten days after receiving the disclosure statement or, where there has been a material amendment thereto, within ten days after receiving the material amendment.

By March 27, 1991, Mr. Baulke had received no reply to his two letters to the solicitors for the vendor/builder and he wrote again demanding the return of the deposit monies. This time, in addition to relying on the failure to deliver the disclosure statement, he referred to the failure to take any action with regard to the stipulated closing dates and said: "Accordingly, quite apart from the rescission remedy available to the purchaser as above noted, it is our position that the agreements are now terminated as a result of the vendor's failure to complete the transaction on the scheduled closing date or alternatively to formerly (formally) extend the closing date as required by the contracts." (see tab 10 of exhibit 25) For the first time, the solicitors for the vendor replied by letter of April 15th (tab 11 of Exhibit 25):

Further to your letter of March 27, 1991, it is my understanding that your clients purchased the property through a consultant manager and that copies of the disclosure statements were handed to their manager for their records. Please speak to your clients with respect to same as the agent has letters from your clients to the consulting manager with respect to the purchase.

It was established at the hearing that the "consultant manager" to which reference is made in this letter was Roger Lapworth, the reference having come partly at least from Exhibit 27 aforementioned. It is to be noted that this letter only goes so far as to say that disclosure statements were given to the consultant manager and does not allege that he brought them to the attention of the Applicant.

Such action on the part of the vendor declarant would only be effective if it were established that Roger Lapworth was an agent of the Applicant for the purpose of receiving these statements. On the evidence which we have, no such finding can be made and so we are left with the situation that the declarant vendor did not deliver a disclosure statement as required by the Act.

There was further correspondence between the solicitors, but it does not really add relevant facts but only puts forward positions and arguments based upon these already set out.

Having failed to get a refund from the vendor, the Applicant filed a Proof of Claim in both instances with the Program on March 2, 1992, claiming \$10,000.00 in each case or a total of \$20,000.00 (see tabs 14 and 15 of Exhibit 25). After some further correspondence, the Program issued its decision by letter of July 27, 1992 which states, in part:

...it is the decision of the Warranty Program that your client's claim for a deposit refund must be disallowed. Our reasons are as follows:

- 1) Financial Loss - The agreements of purchase and sale required your client to pay \$5,000 on execution of the agreement on December 23rd, 1988, and a further \$5,000 payment for each unit ninety days later, or on March 23rd, 1989. The only documentation provided as proof of the loss of these payments is a single cheque made payable to the Markan Group in the amount of \$15,000 dated June 7th, 1989. As such, the documentation does not conform with either the dates or amounts required to be paid pursuant to the agreements of purchase. In the absence of any reasonable explanation, your client has failed to establish that the deposits required by the agreements were paid.

- 2) Vendor's failure to perform the contract - It appears that your client asserts that the vendor failed to perform the contract on two grounds; firstly, that the closing date was extended beyond what was allowed in the agreement, and that the vendor therefore failed to perform the contract. However, in my prior correspondence I referred to various sections in the agreement of purchase and sale which prima facie appear to allow the vendor to extend the interim occupancy closing date up to September 30th, 1992; the condominium registration date up to December 30th, 1992 and the transfer of title date up to January 30th, 1993.

In light of these provisions I asked that you provide a further explanation of your legal basis for asserting that the vendor failed to perform the contract. Your only response was that your client was not offered possession of the condominium unit. The vendor disputes this assertion. As such, your client has failed to satisfy the onus of establishing that the vendor failed to perform the contract on this basis.

3) Right of Rescission

In your first correspondence to the Warranty Program you indicate that rescission is claimed on the basis of the vendor's failure to provide any of the documents as required under the Condominium Act. I therefore asked that you advise which documents you were referring to and secondly to provide your legal reasoning establishing that a right of rescission under the Condominium Act should be taken as proof of the vendor's failure to perform the contract as required by our Act. Your response is simply that your client's right of rescission arises from the vendor's failure to perform its obligations under the Condominium Act. As such, it is our view that your client has failed to satisfy the onus of establishing that the vendor failed to perform the contract as a result of breaches of the Condominium Act.

The appellant's claim is based upon section 14(1) of the Ontario New Home Warranties Plan Act which reads in part:

14.(1) Where,

- (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

.....

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

The question which the Tribunal must now determine is whether, on the facts of this case, the Applicant has brought himself within this statutory provision. There is no question that he has established the following facts:

- he is a person who has entered into a contract with a vendor for the provision of a home - in this case two homes;
- he did not get the homes or, put another way, the vendor did not provide him with these homes;
- he paid the \$20,000.00 by way of deposits;
- the vendor received and kept the \$20,000.00 for the deposits.

The question comes down to whether he has a cause of action against the vendor for his loss resulting from the vendor's failure to perform the contract. In considering this question, it should first be noted that a cause of action on the part of the Applicant against the vendor for the return of the deposit money could in some circumstances result from the vendor's failure to perform the contract and could in other circumstances be based upon something else. In either case, the Applicant might succeed in a regular Court to get judgement for his \$20,000 against the Program, but only in the former case would he be able to succeed in this proceeding against the Program.

Two legal problems must be explored - the first being what is the result of the failure to deliver the disclosure statement and the second being what is the result of the fixed closing dates being allowed to pass and no effective action being taken thereafter to fix new ones?

The effect of section 52(1) of the Condominium Act is that these Offers of Purchase and Sale were never binding upon the Applicant or upon his brother as trustee for him as no disclosure statement was ever delivered, but they were binding upon the vendor. Subsection (2) of section 52 of the Condominium Act states

that a purchaser may rescind an agreement within 10 days after receiving a disclosure statement or a material amendment thereto. This can have no direct application here, but there is an implication from the provision that there is something to rescind at the time the disclosure statement is received and, therefore, that the contract is in place for some purposes, albeit not binding upon the purchaser. The correct conclusion to draw from this would appear to be that this situation before the statement is delivered will continue unless and until such statement is delivered or, if none is ever delivered (as here), until the closing or other determination of the transaction as the case may be. In such case, one possible determination would always be that the purchaser would elect not to be bound further by the agreement, in which case he would be entitled to his deposit back. Therefore, the requirement of the Condominium Act for the delivery of the disclosure statement is not a condition precedent for the coming into being of a binding contract, but rather acts as a condition subsequent to allow the purchaser to elect not to be bound further.

Upon this view of the effect of the failure to deliver the disclosure statement, the contracts were still alive and enforceable by the purchaser against the vendor at the times originally fixed for closing and it was still open to the vendor to act pursuant to the provisions of paragraph 6 of the agreements to extend this same situation in accordance therewith. It was also open to either party, after the closing dates had passed, to reinstate this same situation by giving reasonable notice and fixing a new closing date.

This brings us to the effect of the dealing with the closing dates. Upon the findings made above, both parties waived the provisions of time being of the essence and neither party took effective action to reinstate a new closing date. As aforementioned, the vendor did take some action through the agent to do so, but I have already found that this was not effective action so we are left with the legal situation resulting from both parties letting the fixed date go by and, in effect, waiving the provision that time be of the essence and the legal situation remained what it then was until the purchaser, through his solicitor, took action to attempt to bring the contracts to an end and demand the return of the deposits.

The proper legal conclusions to draw from all of this appear to be the following. From the time of the acceptance of the Offers, the contracts were binding upon the vendor and the purchaser had the option to proceed to enforce them. The purchaser also had the option to declare himself no longer bound, but until he did so the contracts were alive. Time was of the essence with

regard to closing until the fixed dates were allowed to pass by both parties at which point the provision was waived. From this point forward, it was open to either party to fix a new closing date and reinstate the provisions as to time being of the essence upon giving reasonable notice and this remained the case until one of them either did this or took action to terminate the contracts or until there was a mutual agreement to terminate them. In these circumstances, we do not have to consider the question as to what action on the part of the vendor would have been effective for this purpose because it was the purchaser who took such action which was clearly effective. It follows from this that the party who had the obligations under the contract and who failed to carry them out while the contracts were in force was the vendor and, therefore, that it was a party who failed to perform its contracts. This being so, the purchaser's loss resulted from the vendor's failure to perform the contracts and his claim comes within the provisions of section 14(1)(a) of the Act.

Accordingly, the Tribunal pursuant to the authority vested in it by section 16(3) of the Ontario New Home Warranties Plan Act directs the Ontario New Home Warranty Program to allow the claims and to pay to the Applicant the sum of \$20,000.00.

The above decision was appealed to the Ontario Court (General Division) Divisional Court. The appeal had not been concluded at the time of this publication.

METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 833

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE ONTARIO
NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chair, presiding

APPEARANCES:

MAY CHENG, representing the Ontario
New Home Warranty Program

No one appearing for the Applicant

DATE OF
HEARING:

19 August 1994

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal from a decision of the Ontario New Home Warranty Program set out in a decision letter dated June 23, 1993.

As appears from Exhibit 6, the Applicant was served with notice of this hearing to commence at 9:30 a.m. on this date by letter delivered by Purolator to the address given by the Applicant to the office of the Tribunal. No one appeared on behalf of the Applicant at the hearing. The Tribunal waited to commence the hearing until after 10:00 a.m. at which time, no one having appeared for the Applicant, counsel for the Respondent asked for an order disallowing the claim and the Tribunal, pursuant to the authority vested in it by section 16(3) of the Ontario New Home Warranties Plan Act, directed the Ontario New Home Warranty Program to disallow this claim.

SAVERIO AND CATERINA MIGLIANO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: THERESA M. WALSH, Vice-Chair, Presiding
JUDITH KILLORAN, Chair as Member
EDWARD WEISZ, Member

APPEARANCES:
EUGENE TRASEWICK, representing the Applicants

BRIAN M. CAMPBELL, counsel, representing the
Ontario New Home Warranty Program

DATES OF
HEARING: 13, 14 June 1994 Toronto

REASONS FOR DECISION AND ORDER

Mr. and Mrs. Migliano appeal a decision by the Ontario New Home Warranty Program under the Ontario New Home Warranties Plan Act (the "Act") to deny them their claim. They wish to have their home's brickwork entirely replaced because of what they regard to be unacceptable discoloration of the brickwork, particularly when it is wet.

In its decision letter dated May 4, 1993, the Program took the position that the builder, with the help of the brick manufacturer, Canada Brick, had made the Applicants a reasonable offer of repair or compensation and, therefore, was not in breach of any warranty obligation.

Additionally, the Program asserted that only defect that it had found warrantable was that the "brick repair [for discoloration] was not satisfactory". This had now been substantially resolved to the Program's satisfaction; thus, no warrantable defect for which the Program was liable continued to exist.

The Applicants at this hearing argued that all the attempts by the builder and the brick manufacturer have been unsatisfactory to date and, furthermore, that these repair efforts are causing the brickwork to deteriorate.

The facts are that the Miglianos purchased their home in Woodbridge from Astro-Globe Building Group Inc. for the purchase

price of \$392,500. They took possession on November 23, 1990.

Mr. Migliano testified that prior to closing he was dissatisfied with the varying colour shades of the brickwork of his home and expressed his concern to his builder, Astro-Globe. By March 12, 1991, well within the first-year warranty period, the Program was notified in writing of the homeowners' concern respecting the brickwork. On that date, Mrs. Migliano wrote a letter to the builder, sending a copy to the Program, in which she stated:

...we are very concerned with the brickwork performed on our home since the contract stated they would be of a Yorktown style and colour. Instead the home looks very unattractive due to the bricks being composed of two different colour shades.

The builder attempted to remedy the problem in the summer of 1991 through "painting" the brickwork, which was unsuccessful, according to Mr. Migliano. Entered into evidence were pictures of the rear wall elevation taken by Mr. Migliano in the summer of 1991 after this "painting" or tinting treatment. The brickwork clearly shows varying shades of colour. It should be noted that the builder, with the help of Canada Brick, has offered to rebrick the rear wall elevation entirely.

The Program carried out a conciliation inspection of the Migliano home on October 8, 1991. In its report, the Program included as warrantable Mr. Migliano's claim that this brickwork repair was unsatisfactory. The Program stated:

This item was repaired prior to inspection. The homeowner, however, was promised a 25 year warranty of the repair itself and is requesting a copy of said warranty for his records which the builder agreed to supply.

The homeowner further indicated that he was not satisfied with the appearance of the brick when it was wet as the tinted bricks remained light in colour, whereas, the untinted bricks became darker. In a subsequent conversation, the builder agreed to attempt further remedial measures in order to improve this problem.

Under cross-examination, Mr. Migliano disagreed that he first soaked the brickwork before taking the pictures of the rear wall elevation in the summer of 1991, as contended by Mr. Nick Storer-Folt of Canada Brick.

Mr. Nick Storer-Folt of Canada Brick took the position that the tinting process was successful, although he acknowledged that the tinting remedied the colour variation problem only under dry conditions. He stated that the inherently breathable quality of brick will result in colour variations under wet conditions. Bricks absorb moisture in a manner that is not uniform and thus their appearance when wet will not be uniform. This lack of uniformity is more apparent in lighter-coloured brickwork such as that present in the Migliano home. He stated that the home's brickwork had been tinted twice: first in the summer of 1990, in response to a complaint by the builder and again in the summer of 1991. He estimated that about 1500 bricks had been tinted in total, or about 10% of the total brickwork of the home. He said about 1200 bricks or about 75% of the tinted bricks were located at the rear of the house.

Respecting this tinting process, he testified that it has been used since the early 70's to remedy unsatisfactory variation in brickwork colours. To provide this tinting service constitutes less than 1% of the business of Canada Brick, he said, but the service keeps a crew busy all summer.

By letter dated February 3, 1992, a sales representative of Canada Brick had assured Astro-Globe in writing that this "well-established" tinting process "will in no way affect the structural capabilities of the brick". Furthermore, Canada Brick offered a 25-year guarantee of the tinting treatment, stating:

Canada Brick guarantees the professional workmanship and quality of the materials used in this unique masonry colour treatment, for a period of twenty-five years, assuming normal weathering conditions and subject to other job site materials, workmanship and building design meeting industry standards. This guarantee is not applicable to, and thus considered null and void in, any situation that involves masonry which has been subjected to any form of post manufacturing treatment including, by way of example, but not limited to, such matters as sandblasting, silicone treatments or any form of chemical wash (emphasis added).

Nevertheless, the Miglianos remained unsatisfied with the tinting results and the Program agreed with them that these repair efforts were not "completely successful nor acceptable". In a letter dated October 15, 1992, to the Miglianos, the Program discussed the results of its reinspection of the brickwork on September 29, 1992. Mr. Nick Storer-Folt was also present at this meeting, with a representative of the builder.

In the opinion of the Program, the overall appearance and workmanship of the brickwork was acceptable when dry. However, it agreed that an unacceptable contrast in shading developed between the tinted and non-tinted bricks, under wet conditions. Despite this finding, the Program did not regard the builder to be in breach of its warranty because it was continuing, with the assistance of Canada Brick, to remedy the homeowners' concerns about the brickwork.

Mr. Nick Storer-Folt of Canada Brick testified that he then supervised the application of a form of breathable silicone to all of the brickwork in the fall of 1992, except an area where "Mr. Migliano's tomato plants were located". He stated that the only reason for this silicone treatment, which he regarded as successful, was to make the colour more uniform under wet conditions. He testified that all colour variation was not totally eliminated through this silicone treatment.

Furthermore, he was unable to predict the durability of the silicone treatment, he said, because of environmental factors like acid rain. However, he testified that he believed the 25-year tinting guarantee given by Canada Brick, and set out above, still applied despite this silicone treatment.

Additionally, he testified that he inspected the brickwork of the Migliano home in 1990, 1991 and 1992, both before and after treatments, and never saw any spalling or deterioration of the brickwork.

Mr. Martin Weaver, of Martin Weaver Conservation Consultant Inc. disagreed, stating that "certain bricks were already in an unacceptable state of deterioration", upon his inspection on January 8, 1994, on behalf of the Applicants.

However, Mr. Tibor Pal, an engineer, testified that he inspected the Migliano residence on November 12, 1993, and reported his findings to the Program in a letter dated November 29, 1993. He testified that he observed no spalling of the brickwork. However, in his letter, he stated that he observed some chipping of the brickwork, caused by handling and laying.

Mr. Martin Weaver further testified that Mr. Migliano provided brick samples to him, both tinted and non-tinted, from the Migliano residence. In his report, Mr. Weaver stated that he tested certain of these brick samples and subjected them to microscopic examination, which he agreed is not a standard of examination that is applicable to ordinary construction practice. Some of the bricks, according to Mr. Weaver's report, showed extensive "microcracking", which Mr. Weaver described as extremely fine hairline cracking that may be suggestive of deterioration that may occur in the future.

Mr. Weaver also sent other brick samples from the Migliano residence to be tested through 15 freeze/thaw cycles by Ortech in Mississauga. The latter testing produced no significant change in the appearance of the bricks, i.e., no spalling, no breakage and no change in the initially-present cracks, according to a letter from Ortech dated February 10, 1994.

Mr. Weaver stated that the rebricking of the rear wall only was an inadequate remedy because all of the brickwork exhibited a patchy appearance, upon his inspection. He stated in his report that exposure to repeated freeze/thaw cycles is causing the "repellant to break down or be removed in a patchy inconsistent manner". He agreed under cross-examination that he does not know what type of water repellant was used by Canada Brick to coat the Migliano residence. Nevertheless, he concluded that the "water-repellant coatings and paints can be expected to have relatively short lives so that more moisture will be absorbed and the appearance of the masonry will become less uniform and less aesthetically acceptable".

However, Mr. Weaver was concerned not only about aesthetics but also about what he believed could be the continuing deterioration of the brickwork as a result of these processes. He theorized in his report that the application of a water-repellant to cracked brickwork may retard the evaporation of moisture entering the cracks. As a result, hydrostatic pressure builds up and spalling occurs. For these reasons, he recommended that the Migliano house should be entirely rebricked.

Also entered into evidence were testing results by Canada Brick, of bricks from the same production run as that which produced the bricks for the Migliano home. Mr. John Storer-Folt, the Manager of Technical Services for Canada Brick (and the father of Mr. Nick Storer-Folt) testified that generally bricks are not tested in situ because the wall may have deteriorated. Thus, testing is performed at the manufacturing stage routinely, using similar bricks from the same production run. He also testified that microscopic examination of bricks is not a common practice but that it is used in research.

Canada Brick, according to the reports entered into evidence, subjected these similar bricks to 50 no-dry freeze/thaw cycles. Mr. John Storer-Folt testified that in his opinion these test results demonstrated that the Yorktown bricks used in the Migliano home were well within industry standards, were of normal durability and performing adequately. Bricks entered into evidence by the Applicants were examined by Mr. John Storer-Folt, who concluded that these bricks showed chipping from handling and not spalling. Mr. Tibor Pal, in his testimony, agreed with this assessment that the bricks entered into evidence showed chipping and not spalling.

Additionally, Mr. John Storer-Folt of Canada Brick stated that in his opinion the tinting and silicone processes have not damaged the bricks or affected their durability. He stated that the silicone was specifically designed to be breathable. Its purpose is not to impede the evaporation of water vapour but simply to act as a carrier for the tint to soak into the brick, making the colour more uniform.

By letter dated December 9, 1992, the Program agreed with the builder and Canada Brick that this final silicone treatment was successful. Based upon its reinspection on December 8, 1992, the Program was of the opinion that "when the brick is wet, a colour change between the tinted and non-tinted brick does not occur". However, the Program also found that the builder remained responsible for further remedial work to a section of the south garage wall, where different colour shades existed.

The Program carried out another inspection of the Migliano home on April 14, 1993, in response to the homeowners' continuing concerns about the brickwork. As a result of this inspection, the Program, by letter dated May 4, 1993, decided that the builder was not in breach of its warranty obligation by reason of the its offer to rebrick the rear wall, and do specified repair to the garage or pay \$10,000 compensation.

Mr. Scott Rowand, Warranty Representative, testified that the brickwork on the south elevation of the garage varied in shade under dry or wet conditions and thus should be replaced. He confirmed that the Program continues to regard this offer as a reasonable effort by the builder to meet its warranty obligations. Counsel for the Program confirmed that this offer remains open for acceptance by the Applicants.

Mr. Nick Storer-Folt of Canada Brick testified that in order to ensure as close a match as possible between the rebricked rear wall and the rest of the brickwork, Canada Brick would either tint all the new bricks to match the existing brickwork or search existing inventory to attempt to locate a close colour match. Mr.

John Storer-Folt of Canada Brick agreed that perfect colour uniformity cannot be achieved due to the natural properties of brick.

The Applicant's representative argued that the builder's offer to partially rebrick or compensate should be regarded as an admission by the builder of liability both for faulty brickwork and faulty remedial work. He stated that Canada Brick cannot guarantee an acceptable colour match between the rebricked rear wall and the rest of the brickwork. If this remedial work is carried out, the Applicants' representative asked whether the rebricked rear wall will be silicone treated as are the remaining walls? If this wall is not so treated, will this affect colour uniformity? Is it certain that the 25-year tinting guarantee still applies if the brickwork is later treated with silicone? Given these uncertainties and the history of unsuccessful attempts since 1990 to remedy the discoloration problem, he argued that such a partial remedy must be viewed as unsatisfactory.

He further contended that the problem is not lessened because the discoloration worsens under wet conditions; he argued that this expensive residence still looks like a "speckled trout", whenever it rains or is hosed. The remedy therefore that the Applicants seek is the entire rebricking of their home.

Counsel for the Program argued that no breach of warranty exists for which the Program can compensate, while the builder's fair offer to repair or compensate remains open for acceptance.

He further argued that this offer goes beyond what the Program would regard as its liability under the Act. The sole warrantable defect relating to the brickwork, as described in the conciliation inspection of November 1991, was that the builder's "brick repair [for discoloration] was not satisfactory". The Program regarded this defect as substantially resolved by December 1992, with the exception of some remedial work to a garage wall. Thus, the Program takes the position that no warrantable defect continues to exist.

Respecting the alleged deterioration of the brickwork, counsel for the Program argued that the evidence did not support such a finding. He also argued that this alleged deterioration, first reported to the Program outside the first-year warranty period, cannot constitute a major structural defect as defined under the Act. The Applicant's representative conceded that he is not advancing any argument that the brickwork of the Migliano residence is spalling or deteriorating in an unacceptable manner.

This Tribunal agrees that the Applicants' evidence respecting the alleged deterioration or spalling of the brickwork

was not persuasive and this claim thus fails.

Respecting the Applicants' claim that all the brickwork is to be replaced because it is discolored, counsel for the Program argued that it should be dismissed. He argued that the Tribunal should order that the builder's offer be carried out, subject to the Applicants' granting permission.

Upon review of all the evidence and consideration of the arguments, this Tribunal finds that this appeal by the Miglianos must be regarded as premature. We agree that no breach of warranty exists because the builder is making what appears on the evidence to be a reasonable offer to repair or compensate.

For clarification, that offer is set out in the Program's decision letter of May 4, 1993, to the Applicants. The offer reads as follows:

Your builder (Astro-Globe) and the brick manufacturer (Canada Brick) have proposed to either rebrick the rear elevation (ensuring a match as close as possible), replace approximately fifteen (15) bricks on the north elevation of the garage, and reinstate the south elevation of the garage; OR cash settle in the amount of Ten Thousand Dollars (\$10,000.00) as compensation in lieu of repairs.

Without such a breach of warranty as required under section 14(1)(b) of the Act, the Program is neither liable nor empowered under the Act to undertake to rebrick the entire Migliano home or to provide compensation in lieu of such a repair. It follows that this Tribunal is thus not empowered in law to order the Program to undertake such a repair or to provide equivalent compensation.

This Tribunal thus finds that this builder is not in breach of any warranty obligation under the Act that is sufficient to support an appeal to this Tribunal, so long as the Applicants continue to refuse the builder's offer to repair or compensate, as set out above.

If the Applicants elect to accept the builder's offer of \$10,000 in full and final settlement of all their claims against the builder and the Program, then that is the end of the matter.

However, if the Applicants elect to permit the builder to do the promised remedial work and the Applicants can substantiate a claim that the builder's remedial work is unacceptable, the

Applicants retain the same right to appeal to this Tribunal that is available to any owner under the Act.

We agree with submissions by the Applicants' representative that uncertainties exist in relation to the remedial work, and for that reason, the majority of this Tribunal finds that the first-year warranty for the "unsatisfactory brickwork repair" remains alive, pending completion of the proposed remedial work. It follows that should the builder rescind the offer, the Applicants retain a right of appeal, upon the basis of this first-year warranty.

Therefore by virtue of the authority vested in it under section 16(3) of the Ontario New Home Warranties Plan Act, this Tribunal upholds the decision of the Program to deny the claim of the Applicants, so long as the Applicants continue to refuse the builder's offer to repair or compensate, because no breach of warranty exists.

MICHAEL O'BRIEN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: GORDON R. DRYDEN, Vice-Chairman, Presiding

APPEARANCES:

WILLIAM H.A. SMITH, representing the Applicant

BETH SYMES, representing the
Ontario New Home Warranty Program

DATE OF
HEARING:

6 April 1994

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal by the Applicant from a decision of the Ontario New Home Warranty Program set out in a decision letter dated October 7, 1993.

The Applicant's claim against the Program is for damages by way of financial loss sustained by him resulting from the failure of a vendor to perform a contract to provide him with a new home pursuant to Section 14(1)(a) of the Ontario New Home Warranties Plan Act. The relevant facts are as follows.

On October 1, 1991, the Applicant entered into an Agreement of Purchase and Sale with a vendor/builder Beachplace Development Inc. to purchase for the sum of \$130,000, unit 608 in a condominium apartment building being constructed at 9 Pine Street in Grand Bend, Ontario, facing Lake Huron. The Agreement provided for an initial deposit of \$20,000 with the Offer, an additional deposit of \$1,460 upon the installation of the carpet in the master bedroom and upon closing giving to the vendor a mortgage for \$110,000 and the balance, subject to adjustments by certified cheque. The date for closing was fixed for October 15, 1991.

Paragraph 4 of Schedule "C" attached to the Offer deals with provisions for occupancy if the building were substantially complete by the closing date, but the condominium were not then registered and provided that, in such case, the purchaser should take occupancy on that date and pay an occupancy fee calculated in accordance with the Condominium Act. The original wording of this paragraph provided that the monthly occupancy fee not be credited

as payment towards the purchase price. This provision is struck out and initialled, and it was provided that the purchaser was entitled to have such fees so credited by an addition on the next page.

Paragraph 21 of the same Schedule dealing with "Purchaser's Default" provided that if the purchaser defaulted on any of his obligations prior to closing and failed to remedy such default upon 5 day's written notice the vendor might, at its option, declare the Agreement to be at an end and retain all monies paid by the purchaser up to that time as liquidated damages and not as a penalty.

The last sentence in paragraph 29 of the same Schedule dealt with the anticipated imposition of the Goods and Services Tax on January 1, 1992 and provided that, if for any reason, other than the default of the purchaser, the closing was delayed beyond that date, the vendor agreed to indemnify and save the purchaser harmless from any increase in the purchase price resulting from this.

The Applicant took possession of his unit on October 11, 1991 and commenced to pay the occupation rent. The first cheque was paid by his solicitors to the vendor's solicitors and was dated October 11, 1991 and was for the sum of \$2,074.90 which covered the remainder of the month of October and the month of November at a rate of \$1,237.03 per month, being the amount calculated by the vendor. (see tab 6 of Exhibit 6).

Subsequently, the Applicant paid the sum of \$1,237.03 directly to Beach Place Development Inc. on the first days of December 1991 and January through May 1992 for those months occupation rent. As of June 1, 1992, the Applicant stopped paying because by that time he knew that the vendor and the project were in serious financial difficulties and he feared that the transaction might not be completed and he would not get this money paid back as a credit on the purchase price on closing.

In his evidence, the Applicant said he reduced the occupancy fee from \$1,237.03 a month to \$228.73 a month from June 1992 to February 1993.

On May 21, 1992, in a Construction Lien Act proceeding in the Ontario Court of Justice (General Division) upon the application of Royal Bank of Canada, an Order was made appointing Peat, Marwick, Thorn Inc. as a trustee to act as a receiver and manager of the whole undertaking and to have priority over all existing and future encumbrances of the property to carry out this task. (see tab 3 of Exhibit 7).

A further Order was made by the Court on January 14, 1993 discharging all mortgages and liens registered against the property and authorising the trustee to proceed to complete the construction of the building, to register the condominium and to sell or rent the whole or any part of the building or the condominium units and to do a lengthy list of other things which a vendor/builder might have to do in the course of completing such a project. (see tab 4 of Exhibit 7)

On June 3, 1993, another Court Order was issued which provided that the Agreements of Purchase and Sale between Beechplace Development Inc. and the persons listed in a Schedule attached thereto, which list included the Applicant, were terminated without prejudice to claims as between them or as against the trust fund previously established by the Court in this proceeding. The Order finally provided that with a few exceptions which did not include the Applicant, all of the persons who had gone into possession pursuant to agreements with Beechplace were required to vacate by July 5, 1993.

Needless to say, this last provision got the attention of the occupants affected by it. The Applicant immediately approached the trustee to negotiate a new purchase of the same unit from it and, on June 11, 1993 a new Agreement of Purchase and Sale was signed between Peat Marwick Thorne Inc., as court appointed trustee for Beechplace Development Inc. as vendor and the Applicant as purchaser for the same purchase price of \$130,000, payable \$2,000 by way of a deposit, an irrevocable Letter of Credit for \$18,000 within 10 days of acceptance of the offer, and on closing a mortgage back for \$110,000 and the balance of \$18,000, subject to adjustments by certified cheque. The closing was fixed for June 11, 1993. This purchase was, of course, subject to the Goods and Services Tax and there was no provision that it was included in the price or was to be paid otherwise than by the purchaser. The transaction was, in fact, closed on January 17, 1994 when a Deed was delivered and registered from the vendor to the Applicant and his wife as joint tenants. (see tab 11 of Exhibit 6)

Also at this tab is a copy of the Statement of Adjustments which shows a net G.S.T. paid by the purchaser and remitted by the vendor of \$5,824.00, being the 7% of the \$130,000.00 or \$9,100.00 less a credit rebate of \$3,276.00 as shown. The purchasers also received credit on the purchase price for \$6,135.00 paid by them to the trustee as a monthly rental or occupation fee from June 11 through December 1993 at a rate of \$924.00 per month, being a figure for this purpose to which the parties had agreed. The Program questioned whether the Applicant actually paid this amount and the Tribunal gave the Applicant leave to furnish copies of his cancelled cheques after the conclusion of this hearing to establish this payment. The Applicant's solicitors

have furnished these and the Tribunal is satisfied that the total sum of \$6,135.44 was paid as claimed by the Applicant.

Upon these facts, the Tribunal must now answer one and perhaps two questions.

- (1) Is the Applicant a person who has a cause of action in damages against a vendor for financial loss resulting from the vendor's failure to perform a contract to provide him with a home?
- (2) If so, what is the amount which he is entitled to recover as damages for such loss?

As stated at the outset, this follows pursuant to Section 14(1)(a) of the Act which reads in part:

14.(1) Where,

- (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

.....
the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

There is no doubt on this evidence that the Applicant is a person who entered into a contract with a vendor (Beachplace Development Inc.) to provide him with a home. A less open and shut question is whether the Applicant has a cause of action in damages against this vendor for financial loss resulting from its failure to perform the contract.

It was the submission of counsel for the Applicant that there was a breach of the contract by the vendor who never delivered the home to the purchaser (indeed, the contract was terminated on June 3, 1993 by the Order of the Court, but without prejudice to any rights the parties might have against one another so that no cause of action, if one existed, was extinguished by this) and that as a result of the failure to get the benefits of the first contract to buy from Beachplace Development, the Applicant suffered a total loss of \$37,379.92 being his \$20,000 original deposit, \$11,555.92 which he paid to Beachplace as occupation fees for which he was entitled to a credit on closing with it and \$5,824.00 for G.S.T. which he was forced to pay extra

on the purchase at the same price later from the trustee. Since the liability of the Program under Section 14(1)(a) of the Act is limited by Section 6(1) of Regulation 892 to \$20,000, this is the maximum which the Applicant can recover in any event.

Counsel for the Program had little quarrel with the facts as presented by the Applicant but submitted, upon the proper application of the law to those facts, the Applicant should recover nothing or alternatively only a small part of his claim. It was her submission that from October 11, 1991 to June 3, he was obliged to pay \$1,237.03 per month for a total of \$24,341.44 (counting nothing for the 3 days in June 1993) and, in fact, he only paid \$11,555.92 so he got a benefit in this respect of \$12,785.52. Section 14(2) of the Act provides:

- (2) In assessing damages, the Corporation shall take into consideration any benefit, compensation or indemnity payable to the person or owner from any source;

It was the submission on behalf of the Program that the Applicant received this benefit and that it must be deducted from his recovery. She also submitted that he cannot claim the \$5,824.00 required to be paid for G.S.T. on the second purchase because this resulted from the legislative action of Parliament and not from the failure of the vendor to carry out his contract.

Counsel for the Program submitted that the proper way to apply Section 6(1) of Regulation 692 and subsection (2) of Section 14 both quoted above is to calculate first the total loss to an Applicant as a result of the vendor's failure, then if this is over \$20,000, reduce the claim to that amount and then deduct from the \$20,000 any sum coming within the provision of subsection (2) of Section 14.

Both counsel referred the Tribunal to a number of authorities. The Applicant relied upon the case of Marcenko (1980) 9 CRAT 58 where the Tribunal allowed a claim of persons who had purchased a condominium unit from a vendor/builder which transaction never closed, the claim being for a sum which the agreement provided should be credited to the purchaser on closing and at the bottom of p.61, the Tribunal stated:

In attempting to interpret a section in this or any case the Tribunal feels itself bound by the principles of natural justice and of fair play and equity. In cases where members of the public have entered into a relationship with the Warranty Program and come before the Tribunal

seeking relief, having established to the satisfaction of the Tribunal that their conduct has been in all ways bona fide, reasonable, open and honest, and whose difficulties in no way stem from any negligence, dishonesty, greed or misconduct on their own part, but rather from the adverse development of circumstances over which they have had no reasonable or foreseeable opportunity to avoid, this Tribunal does not believe that such members of the public should be penalized or have their difficulties rendered more onerous by reason of harsh application of the principles of interpretation, inappropriate to the circumstances of the case from the standpoint of equity. In this case the Tribunal finds that the sum of \$1,650.00 passed from the Claimants in part performance of their obligation to pay monies to the Vendor. Such monies passed in advance of the closing date and to that extent were advance payment or "deposit" in the sense that word is customarily employed in ordinary commercial usage.

Counsel for the Program referred to the Valiallah (1980) 9 CRAT 87 in which a purchaser took possession of a condominium unit before closing and paid an occupation rent. At the top of page 88, it is stated:

By the terms of the occupancy agreement referred to such rent was not to be credited against the purchase price but was to cover occupancy only.

There is a clear distinction between this case and the one with which we are dealing here on this point. However, the case was cited for a different point, namely, the failure to pay required occupancy fees will result in a benefit within the meaning of Section 14(2) of the Act. In further support of this argument, counsel referred to the Gennings case, a decision of the Tribunal released on December 21, 1992, in which the Tribunal said:

However, the issue before this Tribunal is as follows:

Was the Warranty Program correct in viewing the nonpayment of interim

occupancy fees to be a benefit under subsection 14(2) of the Act such that the Program was mandated in law to set off these arrears against the Applicant's deposit?

Counsel for the Ontario New Home Warranty Program submitted into evidence the decision of this Tribunal in Valiallah, dated June 6, 1980 contained in (1980) 9 CRAT 87. Here the Tribunal found that the Warranty Program was "clearly entitled to set off the back rent owing by the Applicant...as being a "benefit from any source" under subsection 14(2) of the Act.

In the Valiallah case, unlike here, the Applicant had actually resided in the condominium unit. However, the Tribunal is of the opinion that under the circumstances of this appeal, this does not lead to a different outcome. Ms. Gennings did not reside in the condominium unit at any time. Nor did Ms. Gennings rent the unit to assist her to meet her obligation to pay interim occupancy fees. This is so despite the issuance of an occupancy certificate by the appropriate authority.

.....

In the opinion of the Tribunal, the Applicant did receive a "benefit" in being provided with a completed condominium unit for her possession and occupancy from early 1990 until end of June 1991, within the meaning of subsection 14(2) of the Act. Thus, the Warranty Program was correct in viewing the nonpayment of interim occupancy fees by the Applicant to be a benefit, such that the Program was mandated in law under subsection 14(2) to set off these arrears against the Applicant's deposit.

The most important issue to be determined, in this case, is whether the proper interpretation of the statutory and the regulatory provisions above noted is that one should first determine the total loss suffered by the claimant, and if it is over \$20,000, reduce this claim to this amount and after that

deduct whatever should come off as a result of the provision of subsection (2) of Section 14; or whether one should first determine the total loss, and then deduct whatever should come off by reason of subsection (2) of Section 14 and only then apply the limit of \$20,000 if the amount of the claim is still more than that amount.

On this issue, the Tribunal holds that the proper interpretation is the second of these, in favour of the Applicant. The claimant's entitlement against the guarantee fund is rooted in Section 14(1)(a) and the words of Section 14(1) follow all of three clauses. Section 14(2) is simply a further provision as to something which must be done as part of the exercise of assessing the damages payable. In order to apply the whole section, one must complete this exercise as directed and determine what is the total of the claim calculated on this basis. Without Section 6(1) of Regulation 892, the result of this calculation would be the amount recoverable. But the effect of Section 6(1) of the Regulation is that, when the total exercise required by Section 14 has been completed, if the resultant claim otherwise recoverable, is more than \$20,000 it will be reduced to that amount. Therefore, whether or not the aforementioned sum of \$12,785.52 is an amount which should be deducted following the provision of subsection (2) of Section 14 will make no difference in the final result because deducting this from the total of \$37,379.92 will still leave a figure of over \$20,000.

There would be a small reduction if the sum paid for the G.S.T. of \$5,824.00 should be deducted as well. However, I have come to the conclusion that this issue should also be resolved in favour of the Applicant. The real question here is whether the Applicant has a cause of action in damages against Beachplace Development Inc. for this loss.

It is a clearly established principle of law that in any case where a party lays an obligation upon himself (as opposed to a case where the obligation was laid upon him through no act of his own), the law will require him to carry out that obligation, no matter what the intervening circumstances, and hold him liable in damages if he cannot or does not do so. This is why in many types of contracts a list of circumstances is set out which will excuse a party from carrying out obligations such as acts of God or the Queen's enemies, riots, civil disorder, fires, explosions, earthquakes and other things which may be applicable to the circumstances. In this case, Beachplace Development Inc. bound itself without condition and without exclusion to deliver this home at a certain cost and was liable for this item of damage when it did not do so. In the result, the total amount of damages of the Applicant properly calculated pursuant to Section 14(1) and (2) of the Ontario New Home Warranties Plan Act is more than \$20,000 and must be reduced to this sum to comply with the Regulations.

Accordingly, pursuant to the authority vested in it pursuant to Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to pay to the Applicant the sum of \$20,000 being the total amount recoverable upon this claim.

O'NEILL, SHIRLEY AND PAUL

APPEAL OF A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding

APPEARANCES:

MRS. SHIRLEY O'NEILL, appearing on her own
behalf and that of the other Applicant

RICHARD CARTY, counsel, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 7 January 1994

Toronto

REASONS FOR DECISION AND ORDER

Mr. Paul O'Neill and Mrs. Shirley O'Neill appeal a decision by the Ontario New Home Warranty Program denying them compensation for cracks in the foundation of their home and cracking in relation to the garage.

By letter dated August 19, 1993, the Program decided that none of the cracks constituted major structural defects, as defined under the Ontario New Home Warranties Plan Act (the "Act").

April 14, 1989 is the date of possession shown on the Warranty Certificate. By letter dated July 2, 1993, Mrs. O'Neill complained to the Program of foundation cracks in each of the corners of her home. She also noted that the "garage entry door frame [had] severely shifted and the bricks surrounding the frame have shifted and are about to fall off".

There is thus no issue that these defects, first noted in writing in July 1993, must constitute major structural defects, in order to be compensable under the Act.

For ease of reference, the definition of "major structural defect", as set out in section 1 of Regulation 892 to the Act, follows:

1. "major structural defect" means, for the purposes of clause 13(1)(b) of the Act, any defect in work or materials,

(a) that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or

(b) that materially and adversely affects the use of such building for the purpose for which it was intended,

including significant damage due to soil movement, major cracks in basement walls, collapse or serious distortion of joints or roof structure and chemical failure of materials, but excluding flood damage....

On July 26, 1993, the Program performed a conciliation inspection of the O'Neill home. A Note to File and thirteen photographs were produced as a result of this inspection and filed as evidence in this hearing.

Specifically, these photos show vertical cracks around the perimeter of the foundation. The foundation, according to the Note to File, is constructed of concrete blocks.

Mrs. O'Neill testified that she believed the cracking to be caused by a "defect in work or materials". Mrs. O'Neill called no expert evidence. However, a friend of the O'Neill's testified that in her observation the garage appeared to be separating from the house.

In Mrs. O'Neill's opinion, the inspection of the cracking had been inadequate. She expressed a desire for a further inspection to check the footings to determine "why the house is moving".

Mrs. O'Neill did not allege that any of these defects constitute "major structural defects" as defined under the Act. She offered no evidence that any load bearing function or the intended purpose of the house had been materially and adversely affected by these defects. She agreed in cross-examination that the house has been continuously inhabited since possession in 1989.

The Program representative, Mr. Morley Thurston, stated that he has worked for the Program for about 6 years, inspecting homes and determining warranty claims. Previously, he has worked as a building inspector and in carpentry in the construction field for several years.

He testified that in his opinion the cracks at the following locations were minor cracks due to shrinkage of materials:

- a) the northeast corner of the house and at the west juncture of the house and garage;
- b) southwest corner of the house, two cracks;
- c) north wall of garage behind hydro conduit;
- d) north wall of garage above the foundation and below a window in the brick;
- e) northwest corner of garage, one crack on the north and one on the west;
- f) northeast corner of garage, one on the east and one on the north;
- g) foundation of one wall at midsection.

According to the photos and the testimony of the Program representative, the bricks of the home are not cracking in conjunction with these minor cracks in the foundation. The exception was minor cracking in the north wall of the garage above the foundation.

Further, Mr. Thurston stated that in his opinion none of these cracks were the result of settlement, not did they constitute major structural defects.

However, Mr. Thurston did describe one of the two cracks apparent at the northwest wall of the garage as major. He did not consider this particular crack to be a major structural defect as defined under the Act.

The remaining defect, according to Mrs. O'Neill, was the "severe" cracking at the rear entry door of the garage. As described in the Note to File following the conciliation inspection, the bricks are displaced over the garage door at the north end of the steel lintel, from the top of the door up to the soffit.

According to Mr. Thurston, the metal lintel, which supports the brickwork, expands and contracts more readily than the brickwork. As well, the area around the door frame is more vulnerable to cracking. In his opinion, movement would be evidenced by major cracking in the interior of the wall, of which Mr. Thurston stated he saw none. He added that he believed that a minor repair to the mortar of the brickwork would suffice to remedy this cracking.

Additional cracking of about a 1/4" was apparent above the door threshold. As described in the Note to File following the conciliation inspection, the bricks have moved out and their face has blown off. There is also a minor crack in the garage floor at the door threshold, which according to Mr. Thurston, was caused by shrinkage.

In the opinion of the Program, the cracking above the door threshold was caused by water penetration, years of freeze/thaw and the steel lintel pushing the brick area. In the Note to File, he observed that the front area of the garage showed no movement and concluded that there was no settlement of the garage.

In summation, the Program took the position that many of the cracks are excluded from coverage under section 13(2)(d) because they are the result of "normal shrinkage of materials caused by drying after construction." In any event, the Program views none of the defects as major structural defects.

It is clear that the burden of proof is upon the Applicants to demonstrate the existence of a major structural defect (see Feroze, Vol. 20, (1990) at 226). In the Kogan case, Vol. 18, (1989) at 211, the Tribunal elaborated upon the Applicants' obligation to substantiate their claim in order to be eligible for compensation under the Act. At page 211 - 212, the Tribunal stated:

To succeed, the Applicants must establish by evidence that there was a major structural defect as that term is defined in [then] Regulation 726 under the Act, section 1(o). That evidence must satisfy the Tribunal on the balance of probabilities....Unfortunately, the Applicants...did not submit any expert evidence whatsoever to support this position.

In this case, Mrs. O'Neill submitted no evidence whatsoever, expert or otherwise, nor did she even allege that any of the defects constitute major structural defects, as defined under the Act.

The remedy that Mrs. O'Neill was seeking was not even a finding by this Tribunal that a major structural defect exists. Rather, Mrs. O'Neill was seeking an order for further investigation to determine the cause of the cracking. If the Applicants disagreed strongly with the investigatory methods used by the Program, it was incumbent upon them to acquire and present their own evidence substantiating their claim that a major structural defect existed.

While the Tribunal sympathizes with the concerns expressed by Mrs. O'Neill, it is clear that the Applicants have not discharged the burden of proof upon them to establish compensability under the Act for a major structural defect.

Therefore, by virtue of the authority vested in it by section 16(3) of the Ontario New Home Warranties Plan Act, this Tribunal upholds the decision of the Ontario New Home Warranty Program to deny compensation to the Applicants, upon the basis that the existence of a major structural defect has not been established.

PEREIRA, JOSEPH K.

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding
SUSAN TANNER, Vice-Chair, sitting as member

APPEARANCES:

JOSEPH K. PEREIRA, appearing on his own behalf

JANE BACHYNSKI, counsel appearing on behalf of
the Ontario New Home Warranties Program

DATE OF

HEARING: 19 November 1993

Ottawa

REASONS FOR DECISION AND ORDER

Mr. Joseph Pereira appeals a decision by the Ontario New Home Warranty Program to deny him compensation for four cracks in the foundation of his home.

By letter dated October 19, 1992, the Program decided that none of the cracks constituted a major structural defect, as defined under the Ontario New Home Warranties Plan Act (the "Act").

The facts are as follows:

On August 25, 1988, Mr. Pereira took possession of his home. By July 1989, one leaking crack had appeared in the north (rear) basement wall ("Crack #1"). On August 24, 1989, within the first-year warranty period, this crack was reported to the Program. The Applicant's builder, Regional Builders (Nepean) Inc., repaired the crack, using the epoxy injection method.

By January 1990, an additional leaking crack appeared in the west basement wall ("Crack #2"). On February 1, 1990, within the two-year warranty respecting water penetration through the basement, this crack was reported to the Program. Again, the Applicant's builder repaired this crack, using the same method of epoxy injection.

In April 1992, Mr. Pereira advised the builder that Cracks #1 and 2 had re-opened and were leaking. At the same time, he reported two additional leaking cracks, both on the west basement wall: one crack was about 16 feet from the front corner of the house ("Crack #3"); another crack was about 3 feet from the

front corner, with the top of the crack running into a concrete repair patch (Crack #4").

The builder inspected the cracks in April 1992 and, according to Mr. Pereira, refused to repair them. Mr. Pereira also testified that he has made no effort to repair these leaking cracks, which remain to date.

Mr. Pereira stated that the builder advised him that the four cracks were the result of blasting operations by another construction company, Minto Developments Inc., in the fall of 1991.

A preliminary issue to be determined is what affect, if any, these blasting operations have upon the Applicant's claim.

The Program, in both its decision letter and later correspondence of January 1993, has taken the position that these blasting operations may have caused the cracks. The Program finds support for this position in Mr. Pereira's letter to the Program dated October 24, 1992, stating that several neighbours report basement cracks. Mr. Pereira, for his part, noted in his letter that these neighbours' homes were also built by Regional Builders.

Mr. Mervin Clarke, Vice-President of Regional Builders, also testified that he believed the cracks were caused by the blasting operations. He stated that he owns a neighbouring home and could feel the vibrations during the blasting period.

By letter dated May 26, 1992, EXPLOTECH, specialists in explosives and blasting techniques, reported to Mr. Pereira, on behalf of Minto. The author of the letter, Mr. Pete de Carle, a Civil Engineering Technician, also testified on behalf of the Applicant.

According to Mr. de Carle, EXPLOTECH had carried out a pre-blasting inspection on behalf of Taggart Construction, who performed the blasting operations for Minto. These blasting operations took place from September 23, 1992 until October 1, 1992.

Mr. de Carle took the position that the blasting operations did not cause the cracks in the Applicant's basement. He relied upon information obtained from seismographic records as well as an inspection of the cracks in the Applicant's basement walls.

According to Mr. de Carle's review of the records from the seismograph installed by Taggart, the highest blasting vibration recorded was a particle velocity of 3.2 mm./second. This was recorded at the house closest to the blasting operation, which is 291 Centrepointhe Drive. According to Mr. Pereira, his home is

located about 158 m. from the blasting site, while 291 Centrepointe Drive is about 97 m. distant from the site.

Mr. de Carle also testified that no other blasting took place before the seismograph was installed, with the exception of one day of blasting. This blasting site was located at a further distance from the Applicant's home. In Mr. de Carle's opinion and based upon other records reviewed by him, the particle velocity levels from the blasting at this other site would certainly be less than the highest recorded level of 3.2 mm./second at the site closer to the Applicant's home.

As for the accuracy of these seismographic records, Mr. de Carle stated that Taggart Construction would be unable to alter the records. Based upon his experience with Taggart Construction, he stated that he presumed the company had the ability to install the seismograph properly to ensure accurate readings.

Mr. de Carle further testified that, in his experience, hairline cracks in plaster or drywall may occur at the threshold of 50 mm./second. Clearly, upon this evidence, the highest blasting vibration in the Applicant's neighbourhood during the fall of 1992 was well below any level expected to cause even cosmetic damage to construction.

This Tribunal finds the Applicant's evidence persuasive, on a balance of probabilities, that the blasting operations are not determinative of whether the Applicant is entitled to compensation under the Act.

The issues that are determinative of the Applicant's entitlement are as follows:

- 1) whether Cracks #3 and 4, first reported about 3.5 years after the date of possession, constitute major structural defects as defined under the Act;
- 2) whether Crack #1, reported within the first-year warranty period and repaired subsequently, continues to be subject to any warranty under the Act; and
- 3) whether Crack #2 continues to be subject to any warranty under the Act. This crack was reported within the two-year warranty period respecting water penetration in the basement and repaired subsequently.

Respecting his claim that Cracks #3 and #4 constitute a major structural defect, the onus is upon Mr. Pereira to establish that these cracks are caused by a defect in work or materials that materially and adversely affects either a load-bearing function of the home or the use of the home for the purpose for which it was intended.

In Mr. Pereira's opinion, these cracks were caused by settlement or soil movement. He also alleged that the concrete repair patch at the top of Crack #4 did not comply with the Ontario Building Code.

Mr. Pereira stated that he removed the drywall to examine the entire cracking. However, he did not request that either the builder or the Program remove the drywall nor that either party re-attend his home for another inspection, after the removal of the drywall.

Mr. Pereira also advised the Tribunal that he is a Professional Engineer who assesses the failure of structures like concrete and steel. He stated that he has no engineering experience with residential structures nor poured concrete basement walls. In his work as a mechanical engineer, he stated that he does not apply the Ontario Building Code. However, he contended that no relevant differences exist between the Ontario Building Code and the building specifications upon which he relies in his work.

Mr. Pereira relied heavily upon his own opinion in attempting to establish that Cracks #3 and 4 constituted major structural defects.

In the view of this Tribunal, the principal weakness of Mr. Pereira's opinion evidence was that he did not establish the relevancy of his training nor the expertise of his opinion as both relate to residential structures and, particularly, to cracks in the concrete foundation of a home. Similarly, Mr. Pereira did not establish the applicability of other building code standards.

On the contrary, through the testimony of his own witness, Mr. de Carle, Cracks #3 and 4 were admitted to be less than 1/16th" wide, with no apparent affect upon a load bearing capacity of the home.

Ms. Heather Mayhew for the Program testified that Cracks #3 and 4 were hairline cracks that were consistent with shrinkage of materials.

Further, Mr. Pereira admitted under cross-examination that the home has been continuously inhabited since 1988. He stated that he ceased finishing the basement in 1992 because of the

cracking and thus, the basement cannot be used for the purpose for which it was intended.

Upon the evidence presented, this Tribunal finds that Mr. Pereira has not discharged the burden upon him to establish that Cracks #3 and 4 constitute a major structural defect, as defined.

Having found that Cracks #3 and 4 are not compensable as major structural defects, the next issue is whether Crack #1 continues to be subject to any warranty under the Act.

Towards this, Mr. Pereira argued that the repairs made under warranty to both Cracks #1 and 2 must be of reasonable durability to accord with the spirit of the Act. He further argued that the Act, which is designed to protect consumers, cannot be interpreted to provide repair warranties only to the extent that the repairs last until the expiration of the warranty period. In Mr. Pereira's view, the warranty repairs "merely served as temporary fixes for symptoms of a problem that still prevails", that is, settlement.

On behalf of the Program, Heather Mayhew advised that the policy of the Program is to expect that repairs under warranty are to remain durable for one year only, after the repair is made. Counsel for the Program argued that the Act provides no perpetual warranty upon repairs.

The parties also differed respecting the suitability of the method of repairing Cracks #1 and 2, that is, the epoxy injection method. In Mr. Pereira's opinion, this method is suitable to repair only stable cracks, which he contends are not present here. He stated that the epoxy is too rigid and that a flexible membrane should have been used to repair these less stable cracks.

The Program representative stated that the epoxy injection method was viewed as a suitable method to repair the cracks in the foundation of the Applicant's home. She stated that if the Program had been responsible for the repair of Cracks #1 and 2, this is the method the Program would have been used.

She further stated that the Program has used this particular repair method over the last five years for leaking cracks and even cracks that constitute major structural defects. This method would not be used if the cracking was due to major soil movement, which in her opinion, was not the case here. According to the Program representative, epoxy injection is a flexible method of repair that is an improvement over the exterior cement patch. In the Program's brochure respecting "Basement Cracks", apparently published in 1991, the epoxy injection method is suggested for the repair of foundation cracks from the interior.

The Program representative testified that she made inquiries as to the possible reasons for failure of the epoxy injection method. She stated that she was informed of only one incident of failure where the builder had first attempted repairs using another method, which in turn, hindered the effectiveness of the epoxy injection method.

Mr. Mervin Clarke for Regional Builders testified that the epoxy injection method is "virtually the standard in new home construction". He stated that no other method has been used by Regional Builders in the last five years. Epoxy injection, in comparison to cement patching, is a more successful, cleaner method of repair, according to Mr. Clarke.

Mr. Pereira's own evidence is that the chance of failure of an epoxy injection repair of a stable crack is less than 1 in 100.

Upon all the evidence presented, this Tribunal finds that the repair of both Cracks #1 and 2 was by a suitable method and was reasonably durable, lasting about 2.5 years.

What then are the legislative requirements respecting repairs made under warranty?

Section 13(4) of the Act describes the first-year warranty in terms of the process for triggering entitlement:

A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

In comparison, the two-year water penetration warranty is described differently. It is described simply in terms of its duration, that is, two years from possession. Section 14 of Regulation 892 states:

Every vendor of a new home warrants to the owner that there will be no water penetration through the basement or foundation of the home for two years after the date upon which the house is completed for possession.

Respecting Crack #2, Mr. Pereira received the benefit of the two-year water penetration warranty. For a period from August 1988 until April 1992, Mr. Pereira, through the provision of a repair to Crack #2, was provided a water-tight basement.

Respecting repairs made under the first-year warranty, it is the view of this Tribunal that such repairs must be reasonably durable under all the circumstances. The policy of the Program appears reasonable so long as it is sufficiently flexible to take into account all the circumstances of the individual applicant.

In this case, this Tribunal finds that this standard has been met. The repair of Crack #1 was reasonable under all the circumstances. The repair method was suitable and the repair was of reasonable durability, lasting from the fall of 1989 until the spring of 1992. Thus, we find no compensation payable for the claim relating to Cracks #1 and #2.

Therefore, by virtue of the authority vested in it under section 16(3) of the Ontario New Home Warranties Plan Act, this Tribunal upholds the decision of the Ontario New Home Warranty Program to deny the Applicant compensation for cracks in the foundation of his home.

JOHN PETRUZZO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JUDITH A. KILLORAN, Chair, presiding

APPEARANCES:

JOHN PETRUZZO, appearing on his own behalf

STEPHEN A. AUSTIN, representing the
Ontario New Home Warranty Program

DATE OF
HEARING:

24 October 1994

Toronto

REASONS FOR DECISION AND ORDER

The Applicant appeals the decision of the Ontario New Home Warranty Program (the "Program") to disallow his warranty claims under section 14(1)(b) and (c) of the Ontario New Home Warranties Plan Act (the "Act"). This decision can be found in a decision letter dated June 3, 1994.

At the outset, both parties agreed that the hearing would be restricted to the items listed in the Applicant's letter to the Program dated May 6, 1994. They were system reference items: 1, 3, 4, 6, 9, 10, 11, 14, 15, 16, 17, 19, 20, 21, 22, 23, 25, 30, 31 and 33. The System Reference Numbers are recorded in two inspection reports dated September 27, 1993 and March 1, 1994.

The Tribunal did not consider new issues which were raised in the course of the hearing since Regulation 892, section 4(1) of the Act requires that all claims must be made in writing to the Program.

The Applicant testified and entered as evidence photographs which were labelled as Exhibit 7(a)-(n) and sketches labelled as Exhibit 8(a)-(c). The Program called three witnesses; namely, Bob Thoburn, Warranty Representative, Phil Humphreys, Operations Manager and Rosemary Palmieri, an employee of the builder. Mr. Thoburn testified concerning an inspection and conciliation report dated September 27, 1993 and Mr. Humphreys testified concerning a reinspection and report dated March 1, 1994.

This claim concerns the following warranties found in section 13 of the Act:

- (1) Every vendor of a home warrants to the owner,
 - (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in material,
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code;
 - (b) that the home is free of major structural defects as defined by the regulations; and
 - (c) such other warranties as are prescribed by the regulations.

The Tribunal finds that those items which had warrantable defects have been repaired and any remaining complaints of the Applicant are not warrantable.

System Reference #1

The Applicant insists that all interior doors, including trim, baseboard, and window surrounds should have been mahogany as stated in the Agreement of Purchase and Sale. There is no dispute that such a substitution took place. However, the substitution of pine for mahogany resulted in a material which was of equal quality. This is confirmed by an invoice to the builder from a supplier which documents the cost of the material.

System Reference #3

This complaint relates to the squeakiness of the floors and is now restricted to the main floor. This is excluded under section 13(2)(d) of the Act which lists normal shrinkage as a warranty exclusion. The evidence entered leads the Tribunal to conclude that the squeaks are fairly minor and the gaps between the fingers of parquet flooring are due to normal shrinkage.

System Reference #4

The carpet seams on the second floor are said to be too noticeable. Mr. Thoburn's conciliation report found the carpet seam at the threshold to the master bedroom to be warrantable. However, the Applicant confirmed via fax to the Program dated December 15, 1993, that he did not wish the builder to proceed with remedial work. According to the re-inspection report dated March 1, 1994, the carpet seams are said to appear completed in a good and workmanlike manner. The pictures entered by the Applicant do not establish seams which are unreasonably prominent.

System Reference #6

This refers to cosmetic repairs done to floor coverings in the kitchen and living/dining rooms. The March 1994 conciliation report notes that the defective tile in the kitchen was replaced and is acceptable. There is no mention of any broken marble tile in the threshold in the Certificate of Completion and Possession. This tile could have broken for any number of reasons and the evidence does not support a finding that it is a warrantable defect.

System Reference #9

A wood piece was installed instead of a grill in the jacuzzi. The wood piece has been replaced by the builder. However, the evidence is that this item is not warranted because the work on the jacuzzi was contracted for by the owner with an independent contractor and is not the work of the builder.

System Reference #10

The driveway is alleged to be too steep with improper grading. According to the re-inspection report, the grade between the two homes is acceptable. This item is not warranted because the establishment of floor and grade elevations is the responsibility of the Municipality of Mississauga and beyond the scope of the Act.

System Reference #11

The Applicant alleges that the railings on the porch steps are too short and need paint. The hand-rail has been extended and the painting completed.

System Reference #14

This relates to a complaint that the exterior elevation has changed from the original. However, the drawing relied on by the Applicant is not a schedule attached to and forming part of the Agreement of Purchase and Sale. It is an artist's sketch and if it did form part of the Agreement, section 4(f) which allows minor changes in plans, siting and specifications, would apply.

System Reference #15

The finish of the cement slabs at the patio doors is unsightly, according to the Applicant. Again, both inspection reports found the remedial resurfacing of the sill to be acceptable and the Applicant's evidence does not establish a warrantable defect.

System Reference #16

This relates to a loose patio door step, a complaint that the patio doors are not professionally installed and the second floor side windows are poorly installed. All warrantable issues noted in the first conciliation report have been corrected so that the second report concludes that the steps are stable and secure, the patio doors are installed properly, and the trim at the patio doors is acceptable, as is the fascia. The pictures entered as evidence by the Applicant do not counter these conclusions.

System Reference #17

The Applicant maintains that the porch railing should be four inches above the porch floor. However, the Ontario Building Code requires that the railing should be no more than four inches above the slab and the railing is 1 1/2 inches above. Therefore, there is no breach of warranty.

System Reference #19

The garage floor is said to slant enormously. Both inspection reports found that the floor sloped 11 inches in 20 feet, which is not excessive. The photographs of the Applicant do not establish that the slope is excessive. The Ontario Building Code only requires a positive slope to the exterior.

System Reference #20

The complaint is that the garage roof does not meet the wall all the way across. Mr. Humphreys' Report of March 1, 1994 finds that the builder has repaired this defect satisfactorily.

System Reference #21

The Applicant claims that the garage floor has a v-shaped groove at the door. As well, he claims that the back door was incorrectly installed with a messy repair and the garage floor doesn't meet the back wall. The first inspection report found that the garage is an unfinished area and does not require the same level of finishing as the interior of the house. The small gap between the floor slab and the wall is attributed to the shrinkage of materials and is excluded from warranty.

System Reference #22

The complaint is that the cold room has a rough finish with metal pieces sticking out of the wall and an improperly finished ventilation hole. The builder removed the snap ties but the other items do not appear to be warrantable as this is an unfinished portion of the house. The metal tie backs remain as they are required to secure the front steps.

System Reference #23

The Applicant claims there was a water leak in the cold room. As there was no water leak at the time of the two inspections, the Applicant was advised to monitor and advise the builder and the Program if the water leak recurred. The owner did not advise the Program of any recurrence and did not testify at the hearing of any recurrence.

System Reference #25

The complaint is that one light switch turned on three lights, the porch and the front and back of the garage. The installation as provided complies with the Ontario Building Code and is not warranted.

System Reference #30

The Applicant believes that the frame cut in the cement wall is too large for the window. Both inspection reports found no defects in workmanship or materials, nor were there any infractions of the Ontario Building Code. The picture entered as evidence by the Applicant does not establish a warrantable defect.

System Reference #31

The Applicant is of the view that there does not appear to be any support for the fireplace. Both inspection reports found that the concrete is sound, reinforced, and supported by the foundation wall. There were no observations of defects in materials or workmanship and no Ontario Building Code violations noted. The Applicant did not present evidence of a warrantable defect.

System Reference #33

The complaint is that there is an open gap between the and the ceiling in the basement. Also, the top basement railing was loose. However, these defects have been repaired by the builder and this is indicated in the most recent conciliation report.

Based on the evidence, the Tribunal finds that the home in question is constructed in a workmanlike manner, is free from defects in material, is fit for habitation, is constructed in accordance with the Ontario Building Code, and is free of major structural defects as defined by the regulations.

Accordingly, by virtue of the authority vested in it under section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal upholds the decision of the Ontario New Home Warranty Program to disallow the claim of the Applicant.

I. POOSTCHI

APPEAL FROM A DECISION OF THE
ONTARIO NEW HOME WARRANTY PROGRAM

TO DISALLOW A CLAIM

TRIBUNAL: THERESA M. WALSH, Vice-Chair, presiding
GERRY BEECH, Member
HANS G. KEPPLER, Member

APPEARANCES:

I. POOSTCHI, appearing on his own behalf

STEPHEN AUSTIN, counsel, representing the Ontario
New Home Warranty Program

DATE OF

HEARING: 9 August 1993

Toronto

REASONS FOR DECISION AND ORDER

Mr. Poostchi appeals a decision by the Ontario New Home Warranty Program to deny him compensation for alleged defects to his home, including basement leakage, and for financial losses. At this hearing, Mr. Poostchi claimed damages of \$7666.25 plus an additional \$2400 for air fare, bringing his total claim to some \$10,666.25.

Four main issues are in dispute:

- 1) when did Mr. Poostchi give sufficient notice in writing to the Program of his claims?
- 2) if this Tribunal finds that such notice was given more than one year after Mr. Poostchi took possession of his home, do any claims constitute "major structural defects"?
- 3) is there sufficient evidence of basement leakage to support a claim for compensation?
- 4) is Mr. Poostchi's claim for financial losses, such as air fare and bus fare, compensable under the Ontario New Home Warranties Plan Act (the"Act").

From the outset, this Tribunal notes that it is hampered by the almost complete lack of evidence presented by Mr. Poostchi supporting his claims. The Tribunal further notes that Mr. Poostchi

was aware of the requirement to bring forth evidence to support his claims. We refer to correspondence from the Program, for example, the Program's letters of June 6, 1990 and February 13, 1991, reminding Mr. Poostchi of the need to provide documentation to support his claims.

Issue No. 1

On May 1, 1989, Mr. Poostchi took possession of his home, which was sold to him by a registered builder.

This Tribunal accepts upon the evidence presented, including the testimony of the Program representative, Mr. Perry Harkin, that the Program first received written notice from Mr. Poostchi in a letter dated 22 April 1990 and received in the Program's offices on May 15, 1990 (the "May 15, 1990 letter"). In this letter, Mr. Poostchi asked the Program to consider the letter as notice of "2nd year basement leakage", although no details were provided.

Mr. Poostchi in his own testimony did not seriously dispute that the Program first received written notice of his claims more than one year after he took possession of his home.

However, Mr. Poostchi claimed both in the May 15, 1990 letter and in testimony before this Tribunal that he first wrote to the Program on December 21, 1989, which letter was never received by the Program. (the "December 21, 1989 letter").

In the December 21, 1989 letter, appended to the May 15, 1990 letter, Mr. Poostchi claims that his home was unfinished, lacking for example, concrete blocks to the house. Mr. Poostchi further states that he has already taken care of some "urgent items", at his own expense, including a door bell, bruised old wires and rewiring part of the basement because of a "fire hazard".

According to Mr. Poostchi, he did not register the December 21, 1989 letter, sending it instead by air mail from his address in the United Kingdom. The letter was apparently never returned to him.

Under cross-examination, Mr. Poostchi admitted that it was not unusual for his U.K. mail to go astray, sometimes a couple of times monthly. Mr. Poostchi further testified that he was aware as of May 1989 of the one-year limitation on certain warranties under the Act; this was what had prompted his letter of December 21, 1989.

Despite this, Mr. Poostchi chose not to register the December 21, 1989 letter that was to give the required written notice of his warranty claims to the Program within the first year

of possession. Mr. Poostchi testified that his practice was to register for mailing only "important documents" such as his son's school registration, which he stated must arrive on time.

Upon the evidence presented, this Tribunal finds that Mr. Poostchi did not discharge the onus upon him to prove that he gave or attempted to give sufficient written notice of his claims to the Program before May 15, 1990.

Issue No. 2

Because this Tribunal finds that such notice was given more than one year after Mr. Poostchi took possession of his home, the next issue is whether any of the claims constitute "major structural defects" within the meaning of the Act.

Again, Mr. Poostchi's lack of evidence hampers the Tribunal in assessing what claims are to be considered. Towards this, we note correspondence by Mr. Poostchi dated May 30, 1990, in which he promises to forward promptly to the program a "more accurate report of structural defects", which he admitted in testimony that he did not do.

Nevertheless, taking into account Mr. Poostchi's Proof of Claim Form dated May 15, 1990, the Items of Dispute noted in his Request for Conciliation dated June 1990, the Program's decision letter of August 28, 1990 and Mr. Poostchi's claim for damages appended to his letter of January 24, 1991, and referred to before this Tribunal, the following claims, apart from basement leakage, are considered:

- 1) poor quality flooring in living room;
- 2) heaving deck;
- 3) lack of concrete steps to the house; and
- 4) "bruised" wiring in basement, allegedly creating a hazard.

Keeping in mind the statutory definition of major structural defect, it is clear to this Tribunal upon the evidence presented that these claims do not constitute "major structural defects" as defined under the Act. No load bearing function of the home is materially and adversely affected as a result of the alleged defects. Furthermore, despite Mr. Poostchi's claim in testimony that the house was "uninhabitable", for example, because of loose flooring and lack of concrete steps to the house, Mr. Poostchi admitted that he did live in the house, later rented it and then sold it.

He admits that he did not repair the loose flooring before selling the home without apparent abatement in price. Nevertheless, Mr. Poostchi includes in his claim for damages, the amount of \$380.00 for "fixing loose floor boards...estimated cost".

Mr. Poostchi claims that he repaired defects 2 - 4 prior to allowing the Program to inspect these alleged defects, with the wiring being repaired on an "urgent basis".

The only evidence presented by Mr. Poostchi towards the existence of defects 2 - 4, the urgent need to repair and the cost of completed repair was an Ontario Hydro Notice of Deficiency dated July 5, 1989. This Notice states that a ground fault protected receptacle adjacent to the washroom sink must be installed. The Program representative testified that such installation would likely cost about \$75.00. Mr. Poostchi admits he did not install a ground fault protected receptacle, electing instead to send an invoice to the Program dated June 30, 1989 from an electrical contractor in the amount of \$562.60. Mr. Poostchi admitted under cross-examination that the amount of \$70.00 included in this invoice for "moving done to Ottawa from Rockland" was unrelated to the "urgent" wiring repair.

Viewing the evidence presented as a whole, this Tribunal finds that Mr. Poostchi has not discharged the onus upon him to substantiate any of these claims as compensable as "major structural defects".

Issue No. 3

In response to Mr. Poostchi's timely claim that his basement leaked, the Program performed a 65-minute water test along the front foundation wall. Mr. Harkin for the Program testified that he had performed many of these tests and in his experience, leaking usually occurred within 5 - 10 minutes. He further testified that 65 minutes was about three times the usual duration for a water test. However, no water penetration occurred during the test.

The Program thus took the position that Mr. Poostchi's claim was not warranted because there was no confirmation of water leakage into the basement along the front foundation wall.

Mr. Poostchi was of the opinion that the water test was inadequate to confirm leakage. He claimed damages from basement leakage in the amount of \$1200, which was incurred as a result of a rent abatement that Mr. Poostchi negotiated with his tenants because of the wet basement. Mr. Poostchi presented no evidence of this alleged rent abatement nor of the alleged inadequacy of the testing procedure.

This Tribunal finds insufficient evidence of basement leakage to conclude that the Program was incorrect in denying compensation.

Issue No. 4

This Tribunal relies upon section 6(6) of Regulation 892 to the Act, which limits liability to damages to the home only, and finds that Mr. Poostchi's claim for financial losses are not compensable under the Act. Furthermore, Mr. Poostchi presented no evidence whatsoever to support his claims for financial losses.

In summation, upon all the evidence presented, this Tribunal is of the view that the applicant has not discharged the onus upon him to substantiate any of his claims for compensation under the Act or to prove any of his damages. On the contrary, this Tribunal finds that the little evidence presented by Mr. Poostchi was not credible.

Accordingly, by virtue of the authority vested in it under section 16(3) of the Ontario New Home warranties Plan Act, the Tribunal directs the Program to disallow the claim of the applicant.

HARRY RICHARDS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTY PLAN ACT
TO DISALLOW A CLAIM

TRIBUNAL: DAVID APPEL, Vice-Chair, presiding
SELWYN CHARLES, Member
D.H. MACFARLANE, Member

APPEARANCES:
HARRY RICHARDS, appearing on his own behalf
KELLY WADDINGHAM, representing the
Ontario New Home Warranty Program

DATE OF

HEARING: 14 June 1994 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal from a decision of the Ontario New Home Warranty Program rendered April 26, 1993 to disallow all the claims of Mr. H. Richards with respect to a home which he purchased in 1991.

Mr. Richards claimed that the various defects and problems with the home constituted major structural defects whereas the Program held that they were not major structural defects, but rather defects for which claims had to be made within the first year of taking possession of the home. Since Mr. Richards had been in possession of the home for more than one year, all claims against the fund were extinguished.

Mr. Richards stated that in September, 1991, he signed an Offer to Purchase an existing home from the first owners who themselves had bought the home two years previously and had taken possession of it in 1989.

Mr. Richards took possession on November 1, 1991. A list of his complaints with respect to defects in construction and materials can be found in the judgment letter of the Program in tab 7 of Exhibit 4.

As can be seen from tab 7, there were 28 complaints to which Mr. Richards added a 29th at the hearing. The first complaint was with respect to the basement floor cracks. He testified that these cracks were spider web in nature and the biggest crack was 1/4" wide.

The second complaint was that there were cracks in the basement wall. There were a very few cracks of which he estimated one was a 1/4" wide.

The third complaint was with respect to the concrete blocks; he stated that the blocks were 8" when they should have been 10". He also stated that the blocks continued to support the house and that there was no sign of the house in any way not losing their support. He also complained about the absence of weepers which until corrected allowed water to come into the home.

In items 4 and 5, Mr. Richards complained about the absence of a sump pump and that this led to water penetration. Item 6 was that the septic tank had been put on the high side of the property and with a 90 degree angle in the tank. Mr. Richards felt that this was improper installation. Items 8 and 9 dealt with the main beam that supports the house and which Mr. Richards testified was twisted and moving. He repaired this beam at a total cost of \$300 in materials and labour.

Items 10, 13, 18, 20 and 23 all deal with the failure to install R40 insulation; R20 insulation was installed which was clearly inappropriate. It is to be noted that with respect to all these complaints and the ones listed further on, Mr. Richards claimed that they constituted major structural defects because in certain cases, if left unrepaired, they could lead to serious deterioration in the home or render the house unlivable.

Items 11 and 16 dealt with the failure to install tar paper under the vinyl siding. Mr. Richards was forced to do this. He again held this to be a major structural defect.

Item 14 was a complaint of dark lines on drywall joints on ceilings in every room of the home. In his testimony, Mr. Richards said that it was staining. He did not know what the cause was, but said that after priming and painting, the stains were removed. The Program held that this was a cosmetic deficiency whereas Mr. Richards said that it was a major structural defect.

In item 15, Mr. Richards claims that there was no attic hole in the home in contravention of the Ontario Building Code. In item 19, Mr. Richards claimed that there was no insulation under the front entrance of the home and this makes it very cold in that area. He complained that because of the cold, it affected the livability of the home and as such constituted a major structural defect. As to items 21 through 28, Mr. Richards acknowledged that they did not constitute major structural defects. Item 29 was the absence of vents in the attic; this made the attic ventilation inappropriate.

In cross-examination, Mr. Richards said that he used wood as a fuel supply in the home and stored the wood in the basement area. He stated that the wood stayed dry in the basement.

The next witness was John Tebworth, a general contractor who worked on Mr. Richards's home. He corroborated Mr. Richards' testimony with respect to the various matters raised. He went on to state that he did not know what constituted a major structural defect as envisaged by the Ontario New Home Warranties Plan Act.

In cross-examination, Mr. Tebworth testified that he had seen the main beam and found that it did not give proper support to the home. He said that Mr. Richards was always able to live in the home and that the house was standing solidly without any threat of collapse.

The next witness was Mr. Graham Bourras who is a dairy farmer and councillor to Madoc Township. He corroborated the problems mentioned by Mr. Richards, but also stated that the council was advised by its lawyer not to get involved in Mr. Richards's dispute.

The last witness on behalf of the demand was Rhonda Caulker, a schoolteacher who corroborated Mr. Richards' testimony.

In defence, the New Home Warranty Program presented Mr. Terry Kidd, a warranty representative who had dealt with Mr. Richards' case and had drafted the judgment signed by Mr. Philip Mayhew. Mr. Kidd has a degree in architecture and construction engineering. He inspected Mr. Richards's home in March 1993.

At the inspection, he saw cracks in the basement which he said were at a maximum of 1/16" to 1/8" width and constituted hairline cracks. He stated that they resulted from shrinkage and were excluded, therefore, by section 13(2) of the Act. In any case, they certainly were too small to constitute major structural defects. He saw no signs of water leaking into the basement.

He believed that the cracks in the basement floor, the septic tank installation, the insulation in the basement wall, and the 8" block were acceptable under the Ontario Building Code and, therefore, did not constitute defects which could be claimed within the one year warranty period.

As to the other items of complaint, none constituted a major structural defect and, therefore, since no claims had been made within the first year of possession by the original owner, none of the claims by Mr. Richards could be accepted by the Program.

In cross-examination, Mr. Kidd stated that he knew from the beginning that none of the items submitted by Mr. Richards were warrantable, but in view of the numerous defects in the home he said that he would see if the Program could cover any of them

anyway. The Program refused because it did not have the authority to cover complaints which were outside the warranty.

When examined on the cracks in the basement wall, Mr. Kidd stated that the crack was not severe because it was less than 1/4" wide. He had seen the cracks shown in the photographs presented as evidence and this further buttressed his belief that none of the cracks affected the structural integrity of the building and, therefore, none constituted a major structural defect. As to the 8" blocks, he found them to be proper and acceptable.

The Tribunal notes that Mr. Richards only contacted the Program three and one-half years after the first owners took possession of the home. Thus, he was clearly outside of the one year warranty and, therefore, all defects for which he seeks compensation must constitute major structural defects in order to be indemnified under the Act.

The Ontario New Home Warranties Plan Act provides that a major structural defect is one where there is failure of the load bearing portion of the building or which materially and adversely affects a load bearing function or a defect in workmanship or materials that materially and adversely affect the use of the building for the purpose for which it was intended.

The Tribunal finds that except for the complaint with respect to the main beam which, clearly, is a major support for the home, all the other defects complained of constitute defects for which claims have to be made in the first year; none could be characterized as a major structural defect because none affected the structural integrity of the home. While some of these defects, if not corrected, could have led to serious deterioration, this is not the test for what constitutes a major structural defect. It is the defect itself which must be a threat to the structural integrity of the home and not the failure to repair it which leads to further deterioration.

It is also clear that none of these other defects made the home unlivable or unfit for the purpose intended. They were minor in nature and relatively inexpensive to repair. Most, in fact, have now been repaired and the home is habitable.

There have been numerous cases before this Tribunal on the question of major structural defects. All consistently have held that the problems must be very serious and threaten the integrity of the home. The cases have also held that the burden of proof is on the applicant to establish the existence of a major structural defect.

It was held in the case of Dr. Louis Fields (1982) Vol. 11 CRAT 88 at p.92:

The Tribunal accepts that there was a defect in the roof. The Warranty Program admitted this and would have fixed it, they have stated, had it been the subject of a written complaint within the one-year period - which the Tribunal holds it was not. But whether it was a "major" as well as a "structural" one the Tribunal knows not. The evidence ought to have been strong, certain, unequivocal, and authoritative. The evidence presented in support of the claim did not discharge that onus.

In the present case, Mr. Richards, save for the main beam, has also failed to discharge the onus of proof on him.

The Fields case at p.92 and 93 went on to discuss what was meant by the word "major" in the term major structural defect.

The use of the word 'major' in the all-important phrase 'major structural defect', which was devised by the Legislature in its wisdom when it framed this Statute, was almost certainly deliberate. Without it we are left with two words only viz. 'structural defect' and the warranty would apply to anything qualifying for that bare definition. But it doesn't, because the Legislature has used the word 'major'. The defect must therefore be 'major' to be warranted. In this case that has not been proven, although the onus is very clearly upon a claimant to do so in order to succeed.

.....

In passing the Tribunal notes that the use of the word 'major' implies the fact that there exists an antonym to that word or complementary opposite which is the word 'minor'. That is to say, the concept of a 'major structural defect' implies the complementary concept of a 'minor structural defect'. The Legislature must have had both such kinds of deficiencies in contemplation - one warranted and one not warranted."

The Kennedy case (1982) CRAT Volume 11, p.109 held as follows at p. 110:

A major structural defect in our view and as we have found in the past must inter alia be one which renders a home virtually uninhabitable, uncomfortable beyond reason, unsafe or in a state of imminent collapse...

Under the circumstances, the Tribunal by virtue of the authority vested in it by Section 16(3) of the Ontario New Home Warranties Plan Act directs the Ontario New Home Warranty Program to allow Mr. Richards' claim with respect to the main beam and to pay him the sum of \$300 which he himself paid to have the repair paid out. The Tribunal directs the Program to disallow all the other claims since they did not constitute major structural defects.

JACK SCAVUZZO INVESTMENTS LTD.
LEONE LANE INVESTMENTS LTD.

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE ONTARIO
NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JUDITH KILLORAN, Chair, presiding
SELWYN CHARLES, Member
HANS G. KEPPLER, Member

APPEARANCES:
MICHAEL E. CHODOS, representing the Applicants

STEPHEN AUSTIN, representing the Ontario
New Home Warranty Program

DATE OF
HEARING: 20 January 1994 Toronto

REASONS FOR DECISION AND ORDER

Jack Scavuzzo Investments Ltd. and Leone Lane Investments Ltd. (the "applicants") appeal decisions of the Ontario New Home Warranty Program to deny their claims for deposit refunds under section 14 (1)(a) of the Ontario New Home Warranties Plan Act (the "Act"). These appeals have been combined because they involve the same issue and have questions of law and fact in common.

In separate decision letters dated June 4, 1993, the Program denied the claims on the basis that the applicants had defaulted in their obligations to pay further deposit installments prior to closing in contravention of the Agreements of Purchase and Sale (the "Agreements"). For that reason, the Program found the applicants responsible for the initial breach of contract which then disentitled them to compensation.

The Agreements relating to the purchase by the applicants of condominium units numbered 404 and 405 at 97 Lawton Boulevard were signed on February 22, 1990. The purchase price of each unit was specified as \$283,800 with an initial deposit required of \$10,000 "pending completion or other termination" of the Agreements. Proof of payment of \$10,000 was presented by each of the applicants.

Further deposits were required at regular intervals according to the Agreements. These deposits were not paid by the applicants. Jack Scavuzzo, president of Jack Scavuzzo Investments Ltd., testified that there was a collateral agreement with the principals of Lawton Developments Inc. (the "vendor"). He explained that when Automatic Structures, a company in which he and a Mr. Saverino were partners, negotiated to do the concrete form work for 97 Lawton Blvd., they were encouraged by the vendor to buy two condominium units to help make the project "viable". Automatic Structures then deducted \$200,000 from its contract price for the concrete form work in return for a reduction of \$100,000 per condominium unit to the benefit of each applicant.

Mr. Scavuzzo's evidence was that no demand was made for further deposits due to the nature of the collateral contract. The \$200,000 deduction from the concrete form contract was treated as the equivalent of a cash deposit which was apportioned equally to the units. On cross-examination, Mr. Scavuzzo stated that it was his belief that this arrangement relieved him of any responsibility to pay further deposits. Mr. Saverino, principal of Leone Lane Investments Ltd., confirmed that this was also his understanding of the arrangement.

As neither party called the vendor as a witness, it is not for this Tribunal to speculate about the above arrangement, which although unusual, was confirmed by two credible witnesses. The conduct of the vendor, as evidenced by correspondence from its solicitors, verifies that these purchases were bona fide and lends credibility to their version of events.

Correspondence to the applicants from the law firms representing the vendor was before the Tribunal. The letters in question were dated from February 1, 1991 to January 14, 1992. The purpose of each letter was to notify the applicants of extensions to the closing. By separate letters dated January 14, 1992, the solicitors for the vendor advised of an extension to May 1, 1992 and stated: "Our client apologizes for any inconvenience this has caused you and appreciates your patience."

Demand was made on July 18, 1991 by Fridson and Associates, representing Jack Scavuzzo Investments Ltd., to the vendor's solicitor for the return of their client's deposit. This letter advised that as the closing date of July 15, 1991 had passed, the vendor had breached the Agreement.

By letter dated November 7, 1991, Fridson and Associates advised Tibollo, Turk, the vendor's solicitors, that all correspondence should be forwarded to their office since they were acting on behalf of Leone Lane Investments Ltd.

In separate letters to Tibollo, Turk dated January 20, 1992, Fridson & Associates, acting on behalf of both applicants, noted that it was repeating its position that as the condominium units had not been completed by the closing date, the Agreements had been breached by the vendor and demand was made for the return of the deposits.

Fridson & Associates sent identical letters dated May 11, 1992 on behalf of its clients to Tibollo, Turk advising that unless their clients' deposits were returned within seven days, proceedings would be initiated in order to recover the deposits. There was no evidence of any demand having been made by the vendor for the further deposits noted in the Agreements. A letter dated February 11, 1993 from the Program to the vendor advises that failure of the vendor to respond to the claims for deposit refunds will be interpreted as an admission of a breach of the Agreements by the vendor, thereby entitling the applicants to the return of their deposits. There was no response from the vendor who was now in receivership.

In a letter dated April 7, 1993 to Aylesworth, Thompson, Phelan, O'Brien, representing the receiver, the Program enclosed copies of the cancelled deposit cheques and noted: "These claims appear to be valid, if you have any reason why these claims should not be paid, please advise the Program within 7 days of the receipt of this letter."

Apparently the Program was satisfied that the claims were valid because it forwarded separate letters dated April 20, 1993 to Michael E. Chodos, representing the applicants, with Full and Final Release forms to be returned to the Program as soon as possible so that the applicants' claims could be expedited.

The release forms were completed and forwarded by Mr. Chodos to the program on May 5, 1993. In a letter dated June 3, 1993, Mr. Chodos confirmed his advice to the program that his clients had not made subsequent deposit payments because they were concerned that the building construction was not proceeding expeditiously. In his testimony, Mr. Scavuzzo explained that Mr. Chodos had not understood the arrangement negotiated by the vendor and Automatic Structures and therefore, the June 3, 1993 letter was not accurate.

Mark Lacosse, a Regional Manager for the Program, testified that following the return of the releases, the Program became aware that the subsequent payments required by the Agreements had not be made by the applicants. The June 3, 1993 letter from Mr. Chodos was viewed as evidence of a breach of the Agreements by the applicants.

In its separate decision letters dated June 4, 1993, the Program denied the applicants' claims on the basis that they defaulted in their obligation to pay further deposit installments as specified in the Agreements. Therefore, they were found responsible for the initial breach of contract.

In a follow-up to a telephone conversation of June 18, 1993 with Mr. Lacosse, the applicants explained, in a letter dated June 25, 1993, that the further deposits which were required were made in cash and the low selling price of the condominium units reflected the cash advances made.

Joseph Mathew, a representative of BDO Dunwoody Ward Mallette Inc., the receivers for the vendor, testified that there was no record of the applicants' two deposit cheques in the financial records of the vendor. However, on cross-examination, he acknowledged that the financial records obtained from the vendor were not complete and that he had not examined the trust account records of Piccin, Bottos & Bianchi, the law firm to which the cheques were made out.

Counsel for the applicants pointed out that Paragraph 21 of the Agreements, the default provision, specifies that upon default of the purchaser of any covenants in the Agreement, there is a positive obligation on the vendor to put the purchaser on written notice of the default, which if it remains uncured for five days following, allows the vendor to declare the agreement null and void resulting in the forfeiture of all deposit monies as liquidated damages.

There was no evidence presented of the vendor invoking the default provision and putting the applicants on notice for any alleged default. The correspondence from the law firm representing the vendor was quite to the contrary; as reviewed earlier, this correspondence was restricted to extending the closing date time after time and apologizing for delays in construction.

Section 14(2) of the Act specifies that in assessing damages, any benefit, compensation or indemnity payable to the person or owner from any source shall be taken into consideration. Counsel for the Program argued that the applicants had secured the "benefit" of the contract for the concrete form work; condominium units which were reduced in price by \$200,000; and possible income tax advantages as a result.

However, no evidence was presented by the Program to confirm or quantify the alleged "benefit" accruing to the applicants. All the evidence before the Tribunal indicated that the applicants lost money as a result of the aborted closing and a

\$90,000 lien was registered against the property by Automatic Structures. As well, the issue of "benefit" was not addressed in the decision letters as a reason for denying compensation and was raised for the first time at the hearing.

From the time of the signing of the Agreements, the applicants and the vendor were bound to the terms of the Agreements. Based on the evidence before this Tribunal, it appears that the requirements for further deposits were waived by the vendor. The vendor made no demand for the deposits as required by the default provision of the Agreements. However, there was notice provided to the vendor by the solicitor for the applicants, in letters dated July 18, 1991, January 20, 1992 and May 11, 1992, advising that since the condominium units had not been completed by the closing date, the vendor had breached the Agreements.

The evidence of the applicants establishes the following:

- 1) payment of the two deposit cheques to the vendor in the amount of \$10,000 each;
- 2) a collateral contract with the vendor to waive further deposit obligations in return for the equivalent of cash advances reflected in the selling price of the units;
- 3) repeated extensions to the closing dates by the vendor with no demand made under the default provision of the Agreements; and
- 4) demand by the applicants for the return of their deposits due to an aborted closing which put the vendor in default.

The Tribunal finds that the vendor failed to perform the contract and was the party who was in breach of the Agreements. As a result, the claim of the applicants for the return of their deposit monies comes within the provisions of section 14(1)(a) of the Act.

Accordingly, the Tribunal pursuant to the authority vested in it by section 16(3) of the Ontario New Home Warranties Plan Act directs the Ontario New Home Warranty Program to allow the claims and to pay to the applicants the sum of \$10,000 each plus interest owed to them on that amount, pursuant to Regulation 892, section 6(2). The amount of interest is to be agreed upon by the parties, and if unable to do so, written submissions as to the amount of interest shall be filed with this Tribunal which shall then issue an order relating to interest.

SHUMAN, DR. E.M.

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTY PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL:

THERESA M. WALSH, Vice-Chair, presiding
ALBERT LONGO, Member

APPEARANCES:

SUSAN KENNEDY, counsel, representing the Applicant

BRIAN CAMPBELL, counsel, representing the
Ontario New Home Warranty Program

DATES OF 26 November 1993;

HEARING: 24, 25 January; 3 March 1994.

Toronto

REASONS FOR DECISION AND ORDER

Dr. Shuman appeals a decision by the Ontario New Home Warranty Program denying him compensation for 29 alleged defects to his home. These 29 defects are set out in a Conciliation Report arising out of an inspection of Dr. Shuman's home on July 16, 1993 (the "Conciliation Report").

In its decision letter dated July 30, 1993, the Program denied Dr. Shuman's claim upon the basis that all of the defects were reported outside of the one-year warranty period and that none constituted major structural defects, as defined in the Ontario New Home Warranties Plan Act (the "Act").

The Program also noted in its decision letter the existence of evidence that Dr. Shuman may have acted as his own builder, thus disqualifying him from coverage under the Act.

At the hearing of this matter, the Program continued to claim that none of the alleged defects were subject to warranty, as well as to assert that the Applicant was his own builder.

Before turning to the issues at hand, this Tribunal wishes to make clear a preliminary procedural matter. Dr. Shuman chose not to retain counsel for his first appearance before this

Tribunal on November 26, 1993, and proceeded to testify on that date, reading extensively from what he termed his "Exhibit Book", which was entered into evidence. Dr. Shuman was not cross-examined on that date. Subsequently, Dr. Shuman retained counsel and was represented for the balance of this hearing.

Because Dr. Shuman did not have the benefit of counsel on November 26, 1993, and to avoid any perception of unfairness to Dr. Shuman, he was permitted by this Tribunal to commence his testimony a second time on January 24, 1994, with the assistance of his counsel.

Counsel for Dr. Shuman argued the following:

- 1) Dr. Shuman did not act as his own builder; it is argued that his builder was Donald Linton Custom Homes Ltd., who should be regarded as a "builder" within the meaning of the Act;
- 2) all 29 defects should be covered under the first-year warranty set out under section 14(1)(b) of the Act; and
- 3) one defect only, which relates to the heating system, should qualify as a major structural defect and thus should be covered under section 14(1)(c) of the Act.

Dr. Shuman's counsel did not assert Dr. Shuman's claim for what he terms "miscellaneous damages", which include legal fees, cost overrun relating to construction of his home, and apartment rent due to delay in construction. These miscellaneous damages claimed by Dr. Shuman are detailed in what he referred to as the "Compensation Schedule", entered into evidence at this hearing. The total damages claimed by Dr. Shuman, including these miscellaneous damages, amounts to \$144,655.18 plus interest.

The Tribunal notes that these miscellaneous damages would appear to be excluded under section 13(2)(b) of the Act, which states that warranties do not apply in respect of "secondary damage caused by defects, such as property damage and personal injury". The Tribunal thus deals with only the arguments properly advanced and noted above.

The facts are as follows.

On August 17, 1988, Dr. Shuman applied for and received a building permit, in his name as owner. This building permit was with respect to about 8.6 acres of land that Dr. Shuman had purchased in November 1987. He testified that prior to obtaining the building permit, he commissioned an architect to prepare plans for the home he wished erected on his land. The building permit shows Don Linton as the builder.

On August 23, 1988, Don Linton prepared a one-page estimate of the proposed cost of the house (the "Estimate"). This Estimate, entered into evidence, is titled "New Residence Proposal for Dr. Earl Shuman", and is signed by Don Linton. At the top is written: 3063 sq.ft @ \$73.00 = \$223,599. Below that is a "List of Extras above square ft. price", which includes, for example, cedar decks at \$3500, flagstone stoop at \$860, and skylights at \$3000. These extras total \$31,325; when added to the original amount of \$223,599, the Estimate shows the amount of \$254,924 or \$83.23 per sq. ft. A final amount of \$22,000 is added for a "garage", bringing the final total to \$277,924.00.

According to Notes to the Architect's drawings, the owner, Dr. Shuman was to provide 5 items: the kitchen cupboards, vanities and laundry room cupboards, plumbing fixtures and carpeting (the "Notes").

Dr. Shuman testified that August 23, 1988, was when he entered into an oral contract with Donald Linton Custom Homes Ltd. The terms of this oral contract, according to Dr. Shuman, were that Donald Linton Custom Homes agreed to build a house for him on a cost-plus basis, based upon the Estimate. Monthly invoices were to be submitted by Mr. Linton to Dr. Shuman for payment. Upon completion of the house, Mr. Linton's fee was to be 10% of the total material bill and 8% of the total labour bill. Starting date was to be August 1988 and the date of completion was to be February 1, 1989. According to Dr. Shuman, he had an oral contract with Donald Linton Custom Homes that it would be responsible for all aspects of construction except for the 5 items set out in the Notes.

Mr. Don Linton testified that he never entered into a formal contract with Dr. Shuman. He agreed that he prepared the original Estimate, which he stated was abandoned shortly thereafter when he informed Dr. Shuman that he would not proceed with the construction of the home except on a cost-plus basis, given the size of the home. Mr. Linton stated that he had recently worked on the construction of another home on a cost-plus basis and found that arrangement to be satisfactory.

According to Mr. Linton, the parties then mutually agreed to proceed to have the house constructed on a cost-plus basis, with Dr. Shuman to provide cabinetry, plumbing fixtures and flooring. Mr. Linton further stated that the understanding between them was flexible to the extent that Dr. Shuman could exercise his option anytime during construction to take over any aspect of construction.

Dr. Shuman did not disagree that he had such an option. It is apparent on the facts disclosed below that he did exercise

such an option during the construction of his home.

According to Mr. Linton, he and Dr. Shuman consulted frequently during the construction of the home. However, Mr. Linton acknowledged that he did not seek Dr. Shuman's approval for certain major construction matters, for example, the heating/cooling system.

Mr. Linton also testified that he did not register as a "builder" with the Program at that time, nor had he done so in the past, although he has been involved in the building of custom homes since 1973. He stated that he believed that a cost-plus arrangement relieved him of an obligation to register with the Program. According to Mr. Linton, he was a contract manager of the construction of Dr. Shuman's home because he did not undertake to provide all the work and materials to construct a completed home. He admitted under cross-examination that he does not recall making all of this explicit to Dr. Shuman during the construction of the home.

On September 16, 1988, the foundation hole was dug. Dr. Shuman testified that he requested Donald Linton Homes to reposition the hole, which was done.

In March 1989, Dr. Shuman testified that he orally agreed to provide the exterior fieldstone to the home because he was increasingly concerned about cost overruns. The Estimate, it is noted, does not refer to the provision of exterior fieldstone.

On May 1, 1989, Dr. Shuman stated that he elected to move into the house, although it was incomplete, because he was expected to vacate his apartment. Because of the non-involvement of the Program at this stage, no Certificate of Completion and Possession came into Dr. Shuman's hands.

Construction work continued as demonstrated by the invoices, with the total cost of the house amounting to \$404,723.00. Mr. Linton's invoices, including his contracting fee, totalled \$302,776.21, according to a summary prepared by Dr. Shuman respecting the total cost of the house (the "Total Cost Summary"). The construction work for which Dr. Shuman assumed responsibility totalled \$101,946.79.

The Total Cost Summary shows Dr. Shuman contracted out the following items:

- | | |
|--|--------------|
| 1) exterior fieldstone: walls and chimneys | \$37,800.00; |
| 2) cabinets in kitchen, bathroom and laundry | \$18,815.92; |
| 3) floor coverings (vinyl, tile, wood) | \$15,396.92; |
| 4) plumbing fixtures | \$10,169.28; |

5) carpeting	\$5,728.34;
6) dining room cabinets (built-in)	\$3,500.00;
7) window shutters	\$2,974.62;
8) book case (built-in)	\$2,386.00;
9) light fixtures	\$2,158.41;
10) front stoop fieldstone	\$1,280.00;
11) hydro hook-up	\$645.00;
12) bathroom mirrors	\$495.00;
13) door locks	\$413.53;
14) fireplace grates	\$183.17

\$101,946.79

Thus, by his own evidence, Dr. Shuman contributed both work and materials to the extent that they account for about 25% of the total cost to complete the construction of his home.

Under cross-examination, Mr. Linton admitted that he viewed himself as responsible for cost control, although Dr. Shuman reviewed all construction invoices. Dr. Shuman stated that when the work was satisfactory to him, he paid the invoice, whether issued by Mr. Linton or Dr. Shuman's own subcontractors.

On January 10, 1990, Dr. Shuman testified that he discussed his principal concerns with Don Linton about the construction of his home, including water penetration through the roof and basement, air leaks around windows and doors, and the inadequacy both of the drainage/grading around the house and the heating/cooling system.

Dr. Shuman further testified that at this meeting in January 1990, he was informed by Mr. Linton that the Ontario New Home Warranty Program would not be involved because Dr. Shuman had taken out the building permit and Mr. Linton would attempt to resolve Dr. Shuman's concerns.

On September 10, 1990, approximately one year and 4 months after taking possession, Dr. Shuman testified that he made his first contact with the Program. He stated that he telephoned the Program and was informed by an unidentified representative that the Program could not assist him because neither the builder nor the home were registered with the Program.

On December 12, 1990, Dr. Shuman stated that on his own initiative he paid a little less than \$3,000.00 to have his electrical system increased from 200 to 400 amps, in anticipation of the upgrading of his heating/cooling system. Also in December 1990, Dr. Shuman retained his own heating consultant, Mr. Vernon Beck.

In a report dated January 7, 1991, Mr. Beck advised that his efforts to balance the system made a significant difference to the home's temperature but left some rooms more than 2 degrees cooler than the thermostat. He further advised that the solution was not simple; nevertheless, in his opinion, the principal cause of the system's problems was that the heat pump equipment and the ductwork were undersized. Thus, his basic recommendation was for a larger system. Mr. Beck also stated in his report that the heating contractor had done an excellent job in the installation and sheet metal work of the system.

By letter dated February 27, 1991, Mr. Linton's heating contractor, Mr. Stinson, proposed installing, at no extra cost to Dr. Shuman, an extra heat pump, with modified ductwork. Much correspondence and delay then ensued between the parties respecting the most suitable solution to the apparent inability of the heating system to heat all the rooms in the home comfortably.

In September 1991, Dr. Shuman on his own initiative installed a wood stove and baseboard heaters in the basement to help alleviate the heating system defect. Dr. Shuman testified that he does not know if his own remedial work has completely resolved the problem.

In November 1991, Mr. Linton excavated the weeping tiles, repaired them, and had an area around the house regraded, at no cost to Dr. Shuman. Dr. Shuman testified that since that time there has been no water penetration into the basement. He agreed that as of the summer of 1992, the municipality had no existing drainage plan in place covering his property.

On November 25, 1991, Dr. Shuman first wrote to the Program. In the view of this Tribunal, this letter constitutes the first notice in writing to the Program of the Applicant's claim; this is so despite the argument of counsel for the Registrar that a more detailed letter dated February 16, 1992, should be regarded as the Applicant's first notice in writing.

The Program's first inspection of Dr. Shuman's home occurred on November 27, 1991. By letter dated December 16, 1991, the Program concluded that Dr. Shuman had acted as his own builder and thus, his home did not qualify for coverage under the Act.

However, by letter dated January 31, 1992, the Program reversed its decision, finding that Linton Custom Homes was Dr. Shuman's "builder" as defined under the Act. The Program based its conclusion upon the fact that Linton Custom Homes "purchased all of the material and labour (excluding the 5 items that were not part of the Agreement) to complete the dwelling". These 5 items are those referred to in the Notes.

As a result of the Program's decision that Mr. Linton was a "builder", he was requested by the Program in January 1992 to enrol promptly.

The Program also sought unsuccessfully to require Dr. Shuman to pay the enrolment fee to Don Linton, by letter dated June 22, 1992. The Program also states in this letter that the start date of Dr. Shuman's warranty will be the date of possession.

By letter dated October 6, 1992, the Program again reversed its decision respecting the enrolment fee only. The Program requested that Mr. Linton only pay the enrolment fee.

Mr. Linton finally did so, paying the enrolment fee to the Program, in October 1992. Mr. Linton before this Tribunal now requests reimbursement of this enrolment fee, consistent with this position that he is not a "builder" under the Act.

On March 1, 1993, Dr. Shuman testified that he received a Warranty Certificate from the Program. The Certificate states that the date that the warranties commence is the date of possession, which is May 1, 1989.

From November 1991, when the Program was first notified, until its final decision letter of July 30, 1993, the Program inspected Dr. Shuman's home on several occasions, attempting to conciliate the disputes between Dr. Shuman and Mr. Linton.

Noteworthy is a letter from the Program to Dr. Shuman dated July 27, 1992. The Program states:

The reason for the uncertainty as to warrantability is that the understanding of Mr. Linton was that the home was not required to be enrolled where no contract existed and the homeowner was involved in some work....

As you requested the Program has been attempting on many occasions to resolve your deficiencies but due to the original agreement or lack of, the resolutions became more difficult.

Although many deficiencies were alleged by Dr. Shuman, the principal disputes between the parties centred upon the adequacy and method of repair both of the heating/cooling system, and the grading/drainage around the house. These defects, particularly the heating system defect, remained the subject of much evidence at this hearing. Thus, they merit more elaboration.

Heating System

First, the Tribunal notes the description by Dr. Shuman of the most significant consequence of this defect: the family room of his home was rendered uncomfortably cold during the winter, thus forcing him to use the fireplace to maintain sufficient warmth in the room.

Both Mr. Beck and Mr. Stinson testified at this hearing in a credible manner. Mr. Beck advised the Tribunal that his reluctance to endorse Mr. Stinson's proposal was not because the repair method was patently unreasonable; rather, Mr. Beck stated he had insufficient information about that proposal to advise Dr. Shuman properly. He agreed that he advised Mr. Stinson by letter dated June 27, 1992, that with certain minor changes, Mr. Stinson's proposed system "could be made to work within acceptable limits and to within reasonable comfort limits".

Mr. Stinson conceded that he initially underestimated the heat loss in the basement. Thus he proposed that the additional heat pump and modified ductwork would heat the basement only, freeing the rest of the system to heat the remainder of the house. He stated that he believed that a reasonable settlement had been reached between the parties by the summer of 1992.

By letter dated July 27, 1992, the Program similarly advised Dr. Shuman that it viewed the main dispute between the parties, being the remedial work to the heating system, to be close to resolution. This was based upon Mr. Stinson's proposal, a copy of which the Program had received and reviewed, finding that it conformed to the Ontario Building Code. The Program stated that at no cost to Dr. Shuman, the corrections to the heating system were to proceed once Mr. Beck's approval of Mr. Stinson's proposal was received.

Furthermore, the Program viewed Mr. Stinson's proposal as the most economical, providing it met Ontario Building Code requirements, which is stated in its letter to Dr. Shuman dated March 23, 1992. By letter dated March 5, 1992 to Dr. Shuman, Mr. Stinson compared the costs of implementing the two proposals: about \$8600.00 for Mr. Stinson's proposal and about \$18,000.00 for Mr. Beck's proposal.

Mr. Stinson further testified that Dr. Shuman did not permit him to carry out the proposed remedial work. According to the testimony of both Mr. Beck and Mr. Stinson, as well as Mr. Linton, Dr. Shuman did not consult with them when he undertook to remedy the heating problem in the basement.

Grading/ Drainage

Again much dispute and delay ensued between the parties respecting the alleged defects and proposed remedies for the grading/drainage system.

Despite Mr. Linton's remedial work in November 1991, and the apparent cessation of water penetration problems, Dr. Shuman hired Gifford, Harris Surveying Ltd. in the summer of 1992. The author of the firm's report dated August 10, 1992, testified at this hearing. Mr. MacDonald stated that the existing drainage pattern around Dr. Shuman's house was "unacceptable" and would lead to future water penetration problems.

Mr. Linton's grading subcontractor, Mr. Baxter, testified that Dr. Shuman approved the original grade, subject to Mr. Baxter's expertise. He returned with Mr. Linton in November 1991 to do some remedial work. Further, he agreed with the position taken by the Program in its letter of May 22, 1992 to Dr. Shuman that the original grading met the intent of the Ontario Building Code after minor adjustments.

Dr. Shuman testified that in the fall of 1992 he hired a landscaper to resod and regrade his property for about \$20,000.00. He stated that Mr. Linton's repair of the weeping tiles did not assure him that there would be no future water penetration problems, thus necessitating Dr. Shuman's efforts to regrade the property.

As a result of the grading/drainage dispute, Dr. Shuman continues to claim compensation before this Tribunal for the following defects as described in the Conciliation Report: item 5: circular driveway requires new gravel, which has been already installed by Dr. Shuman; item 6: exterior landscaping, which has already been completed by Dr. Shuman; and item 8: drainage tiles not working (grading around entire house is suspect); the grading has also been completed by Dr. Shuman and no further water infiltration has been noted since the repair of the weeping tiles.

Turning to the three issues in dispute, they may be characterized as follows:

ISSUE #1 - IS LINTON CUSTOM HOMES A "BUILDER" UNDER THE ACT?

If Donald Linton Custom Homes Inc. cannot be regarded as a "builder" within the meaning of the Act, then the Applicant is not be entitled to coverage under the Act. The remaining issues thus become moot.

For this proposition, the Tribunal refers to the Crate

case, Vol. 22 (1991) at 604. Because of the centrality of this proposition to this matter, the facts and conclusions of the Crate case are detailed below.

In the Crate case, the applicant, as purchaser, entered into an agreement in writing with Sun-Spec Design-Build Corporation, as vendor, of a piece of uncleared property, on which a home was to be constructed. The Offer of Purchase and Sale was a standard form and showed the Ontario New Home Warranty Plan registration number of Sun-Spec. The enrolment fee was paid by the Applicant to Sun-Spec, which in turn paid it to the Program.

Attached to the Purchase and Sale Agreement was a Schedule of 50 items pertaining to the home. Of these items, at least half were the responsibility of the applicant, including the plumbing, the electrical system, part of the heating system, all interior drywall and trim, kitchen and bathroom accessories, vinyl flooring and carpeting, and all interior finishing. The purchase price was negotiated accordingly.

After taking possession, the applicant complained of defects to items for which Sun-Spec had been responsible. The Program agreed that the defects were subject to warranty. However, upon comprehending the extent of the applicant's responsibility for the construction of the home, the Program reversed its decision.

The Tribunal in Crate determined that the applicant must show that he was an "owner" as defined under the Act, in order to be entitled to coverage under section 14(1)(b) and (c). The applicant was also required to establish that Sun-Spec was a "vendor", as defined under the Act, who then would be liable to the "owner" for the warranties specified under section 13(1) of the Act.

For ease of reference, the relevant definitions are set out:

1. In this Act,

(a) "builder" means a person who undertakes the performance of all the work and supply of all the materials necessary to construct a completed home whether for the purpose of sale by the person or under a contract with the owner;

(g) "owner" means a person who first acquires a home from its vendor for occupancy, and the person's successors in title;

(n) "vendor" means a person who sells on his, her or its own behalf a home not previously occupied to an owner and includes a builder who constructs a home under a contract with the owner.

According to the Tribunal, the applicant was an "owner" only if Sun-Spec was a "vendor" as defined under the Act. The Tribunal concluded that Sun-Spec was not a "vendor" because it did not "sell" a home to the Applicant.

Instead, the contractual obligations of Sun-Spec were to sell a lot to the Applicant and to build part of the home on that lot. In turn, the Applicant was obliged to pay certain monies to Sun-Spec on certain dates and to do assume other building responsibilities.

At page 608, the Tribunal stated:

This was not, therefore, the sale of a home on May 2, 1988. This problem which I have just outlined arises in every case where a builder enters into a contract to sell a home to be built and that is the reason that the last clause was added to the definition [of vendor] 'and includes a builder who constructs a home under a contract with the owner'. It is pursuant to this clause that the normal purchaser of a house to be built gets warranty coverage under the Act. Unfortunately, the Applicant was not such a normal purchaser. To get within this provision, Sun-Spec must be found to be a "builder" within the meaning of section 1(a) of the Act.

The Tribunal found that Sun-Spec was not a "builder" because it did not undertake to perform all of the work nor supply all the material necessary to construct a completed home. However, in the view of the Tribunal, common sense dictated the Program's practice of extending coverage in cases where the owner may have performed relatively small amounts of work or supplied relatively small amounts of material.

The Tribunal at page 608 summarized the issue:

The question is how extensive can these contributions [by the owner] be before they take the home out of the definition [and vitiate the warranty].

The Tribunal was told at the hearing that the program has a general rule of thumb to the effect that the undertaking of the builder must include the services - plumbing, heating, electrical, etc. In this case, the undertaking of Sun-Spec did not include these services and in looking at the total picture, the Tribunal must come to the conclusion that the contribution undertaken by the Applicant in this contract, both as to the work to be performed and as to material to be supplied, was so extensive that Sun-Spec was not a builder who undertook all of the work and supplied all of the material to construct a completed home.

The Tribunal in Crate thus disallowed the applicant's claim and directed that the enrolment fee be refunded.

Keeping in mind the principles laid down in the Crate decision, this Tribunal agrees that Dr. Shuman is an "owner" only if Linton Custom Homes is a "vendor", specifically, a "vendor" who is "a builder who constructs a home under a contract with the owner".

Upon the evidence, there is no argument that Linton Custom Homes is otherwise a "vendor". Linton Custom Homes did not "sell" a home to Dr. Shuman; neither did it sell the lot upon which the home was to be constructed, which was already owned by Dr. Shuman.

In the view of this Tribunal, all the evidence presented can lead to no other conclusion but to find that Linton Custom Homes was not a "builder" within the meaning of the Act.

This Tribunal finds that Linton Custom Homes was not a "builder" because it neither undertook the performance of all the work and supply of all the materials necessary to construct a completed home, nor was Linton's undertaking, such as it was, "for the purpose of sale by himself or under a contract with a vendor or owner".

It is true that unlike the applicant in the Crate case, Dr. Shuman did not supply the home's major systems. However, Dr. Shuman, by his own evidence, subcontracted 25% of the total cost of the construction of the house. What he supplied to the construction of his home cannot be regarded as minor finishing touches, for example, the exterior fieldstone costing about \$38,000.00. Dr. Shuman's work and materials went a long way to making the home habitable.

The evidence is clear that there was an overlapping of responsibilities between the parties. Dr. Shuman owned the land, took out the building permit and supplied the plans. On his own initiative and at own cost, he increased the electrical service, installed a wood stove and baseboard heaters in the basement and regraded the property to his satisfaction.

Therefore, this Tribunal finds that Dr. Shuman undertook the performance of a substantial portion of the work and the supply of the materials necessary to construct a completed home. This finding alone would be sufficient to support our finding that Linton Custom Homes was not a "builder" within the meaning of the Act.

However, this Tribunal also finds upon the evidence that the parties entered into an ill-defined oral arrangement that cannot be regarded as a "contract" under the Act sufficient to make applicable the definitions of "builder" and "vendor" under the Act.

This Tribunal found the testimony of Dr. Shuman to be evasive and self-serving, and the testimony of Mr. Linton to be vague. This Tribunal further finds as a fact that the parties did not enter into a "contract" but rather a vague oral arrangement, each for his own perceived benefit and each to his own detriment.

The Tribunal notes the letter written by Dr. Shuman to the Program dated November 25, 1991, in which Dr. Shuman describes the negotiated arrangement between himself and Mr. Linton:

August 23, 1988. Discuss starting date (soon as possible) & finishing date Jan.1/89. We then discussed in detail method of payment, contracting fee, etc. He explained that his last job was _____[blanked out] & it worked out fine. Alternative would be a formal legal contract with a precise estimate, controls, etc. He explained that with the latter he would be forced to overprice the house to avoid bankruptcy & that generally I would get a better house with a

_____[blanked out]. I expressed my concern with this - specifically, the absence of a fixed price & who pays for work if mistakes are made. Linton tried to allay my concerns with the guarantee of an accurate estimate & said mistakes would be his responsibility.

In the view of this Tribunal, one of the consequences of the ill-defined arrangement between the Applicant and Linton Custom Homes was that neither understood their respective rights and obligations, either to each other or under the Act.

Unlike the Crate case, there was no standard agreement of purchase and sale between the parties. Neither party detailed each other's expected contributions to the construction of the home. Neither party assumed responsibility for enrolment in the Program.

This lack of clarity between the parties resulted in confusion and delay about warrantability under the Act for both parties and the Program. For example, the evidence was conflicting whether Dr. Shuman, after taking possession, complained only of defects to items for which Mr. Linton had clearly been responsible.

We refer for example to the dispute respecting which party was responsible for the alleged fire hazard posed by a chimney in the attic that was built through wooden rafters (Defect #25 set out in the Conciliation Report). Dr. Shuman claims compensation for this alleged defect, testifying that he was responsible for the construction of the chimney from the roof up and not through the attic. Mr. Linton, on the other hand, testified that this chimney, which is for a wood stove, was his responsibility up to the ceiling of the first floor. He stated that Dr. Shuman's claim is for work done by Dr. Shuman's own subcontractors.

With reference to the statutory requirement for a "contract", we note the decision of the Divisional Court dated July 26, 1993, in Carvalho v. Ontario New Home Warranty. The Divisional Court held the Tribunal to be in error, when it stated:

If the transaction between Mr. Carvalho and the builder, in its essence, was for the provision of a home, then it comes with the Ontario New Home Warranties Plan Act.

The Divisional Court went on to state:

The Tribunal erred in thinking that it was

sufficient that there merely be some kind of transaction for the provision of a home. The statute requires a very particular type of transaction; a contract to provide or agreement to sell, not simply a reservation agreement or some other form of contingent option or other transaction. If protection is to be extended to a class of transaction not specified in the legislation that is a matter for the Legislative Assembly, not the court.

The Divisional Court therefore allowed the appeal, set aside the decision of the Tribunal and disallowed the respondent's claim.

The Tribunal also wishes to address the argument made on behalf of Dr. Shuman that he relied to his detriment upon the Program's decision of January 1992 that Linton Custom Homes was a "builder" under the Act.

In response to this argument, we note the statement by the Tribunal in the Almonte case, at (1992) 24 CRAT 393. In that case, the Program had stated in writing that the builder may have committed a compensable breach of contract. At page 396, the Tribunal stated:

The question arises whether this writing by the Program to the Applicant creates some obligation on its part to him which was not otherwise in place. The Tribunal accepts the submission of counsel for the Program that it does not. At a hearing such as his before this Tribunal, an Applicant can only make a recovery as provided in the Ontario New Home Warranties Plan Act or the Regulations made under it. One can envision the Program doing something in circumstances which might give a homeowner a cause of action against it in another forum, but this Tribunal can only here give effect to claims covered by section 13 or 14 of the Act.

This Tribunal agrees that the Program's decision in January 1992 that Linton Custom Homes was a "builder" does not create, in the circumstances of this case, some obligation to allow the Applicant compensation, when he is otherwise not entitled

pursuant to the terms of the Act. Mr. Allan Stevenson of the Program made clear in his testimony before this Tribunal that decision was in error because it was based on incomplete information as to Dr. Shuman's extensive involvement in the construction of his home.

Upon the more complete evidence that has been presented to this Tribunal, it is clear that Linton Custom Homes is not a "builder" within the meaning of the Act.

No matter what the policy reasons are that underlie the legislated definition of "builder", that definition, in the view of this Tribunal clearly does not apply to Linton Custom Homes. The result is that Linton Custom Homes is not a "vender" for the purposes of the Act. Dr. Shuman is thus not an "owner", as defined under the Act, who is entitled to coverage under section 14(1)(b) and (c) of the Act.

The remaining arguments on behalf of Dr. Shuman thus become moot. However, should the Act be found to apply to Dr. Shuman, this Tribunal makes certain findings based upon the evidence presented.

ISSUE #2 - IS THE APPLICANT'S CLAIM COVERED UNDER THE FIRST-YEAR WARRANTY?

As we have stated, one of the consequences of this ill-defined arrangement between the Applicant and Linton Custom Homes was non-registration with the Program. This certainly contributed substantially to the delay in Dr. Shuman's receipt of a Warranty Certificate until March 1993, about 4 years after he took possession of his home.

Dr. Shuman argues that the limitation period respecting warranties should begin much later, for example, the date of the last construction invoice, being September 26, 1989, or even as late as the date when he received the Warranty Certificate, being March 1, 1993. Otherwise, he is the victim of a builder who failed to register under an Act that is designed to protect consumers.

This Tribunal disagrees. Dr. Shuman's claim is unsupportable that he should benefit from a substantially extended first-year warranty on the basis simply that he chose, for his own perceived benefit, to enter and continue in an ill-defined arrangement with his builder.

Dr. Shuman by his own evidence chose to take possession of his home on May 1, 1989. The first-year warranty expired on May 1, 1990. Again, by Dr. Shuman's evidence, his first contact with the Program, by telephone only, was in September 1990. His first

written notice to the Program of his claim was November 1991.

Thus, this Tribunal finds that all of the alleged defects that constitute the Applicant's claim are not covered under the first-year warranty on the basis that the limitation has expired for the proper making of such a claim.

ISSUE #3 - IS THE HEATING SYSTEM DEFECT A "MAJOR STRUCTURAL DEFECT" UNDER THE ACT?

Again, should the Act be found to apply to the Applicant, his five-year warranty for major structural defects would expire on May 1, 1994. Therefore, his claim would be timely in respect of the five-year warranty for major structural defects only.

However, this Tribunal agrees with the submission by counsel for the Program that there is insufficient evidence that the use of Dr. Shuman's home as a home was materially and adversely affected through the defect to the heating system.

Dr. Shuman, by his own evidence, has remained in occupation of his home since May 1, 1989, despite what he describes as the effect of the heating system defect, that is, the family room of his home was uncomfortably cold during the winter and he was forced to use the fireplace to maintain sufficient warmth in the room.

The Tribunal thus finds that any defect to the heating system does not constitute a "major structural defect", as defined under the Act, and is therefore not compensable.

Furthermore, by Dr. Shuman's own evidence, he has on his own initiative helped remedy the heating system defect through installation of a wood stove and baseboard heaters. He did not allow Linton to implement his proposed method of repair, which method the Program had regarded as reasonable.

Additionally, the Program found, at the time of the conciliation inspection in July 1993, that a number of the alleged defects, for example, regrading and landscaping, had already been remedied by Dr. Shuman, on his own initiative, using his preferred methods.

No relief is to be found in again relying upon the ill-defined arrangement between Dr. Shuman and Linton. We refer to Dr. Shuman's testimony that he first learned in 1992 that the Program allows the builder an opportunity to repair alleged defects, before the Program will undertake responsibility for the repair. This position, the Tribunal notes, is set out in a letter from the Program dated November 2, 1992, to Dr. Shuman.

It is clear to this Tribunal that Dr. Shuman, through these self-initiated repairs, has acted unreasonably and thus disentitled himself to compensation under the Act. We refer to the decision of the Divisional Court, dated February 15, 1994, in Metropolitan Toronto Condominium #813 v. 675550 Ontario Ltd. and Ontario New Home Warranty Program. The Divisional Court agreed that where there is no urgency to repair and no proof that the Program's proposed repair is unsatisfactory, an owner who initiates other repairs may find that no breach of warranty exists to support recovery.

For all of the reasons set out above, this Tribunal, by virtue of the authority vested in it under section 16(3) of the Ontario New Home Warranties Plan Act, upholds the decision of the Ontario New Home Warranty to deny compensation to the Applicant. The enrolment fee should be refunded to the payer, Linton Custom Homes.

The above decision was appealed to the Ontario Court (General Division) Divisional Court. The appeal had not been concluded at the time of this publication.

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